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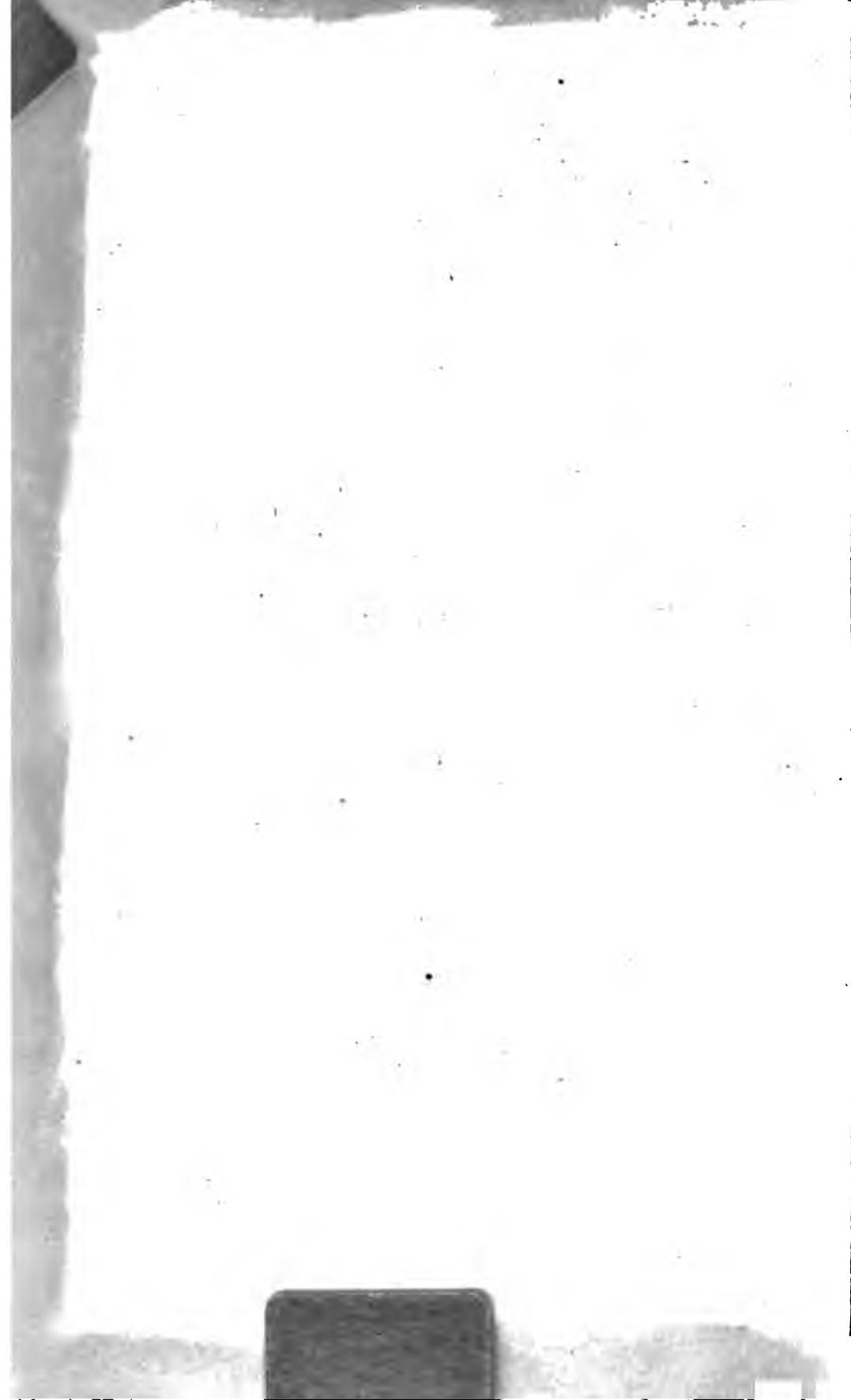
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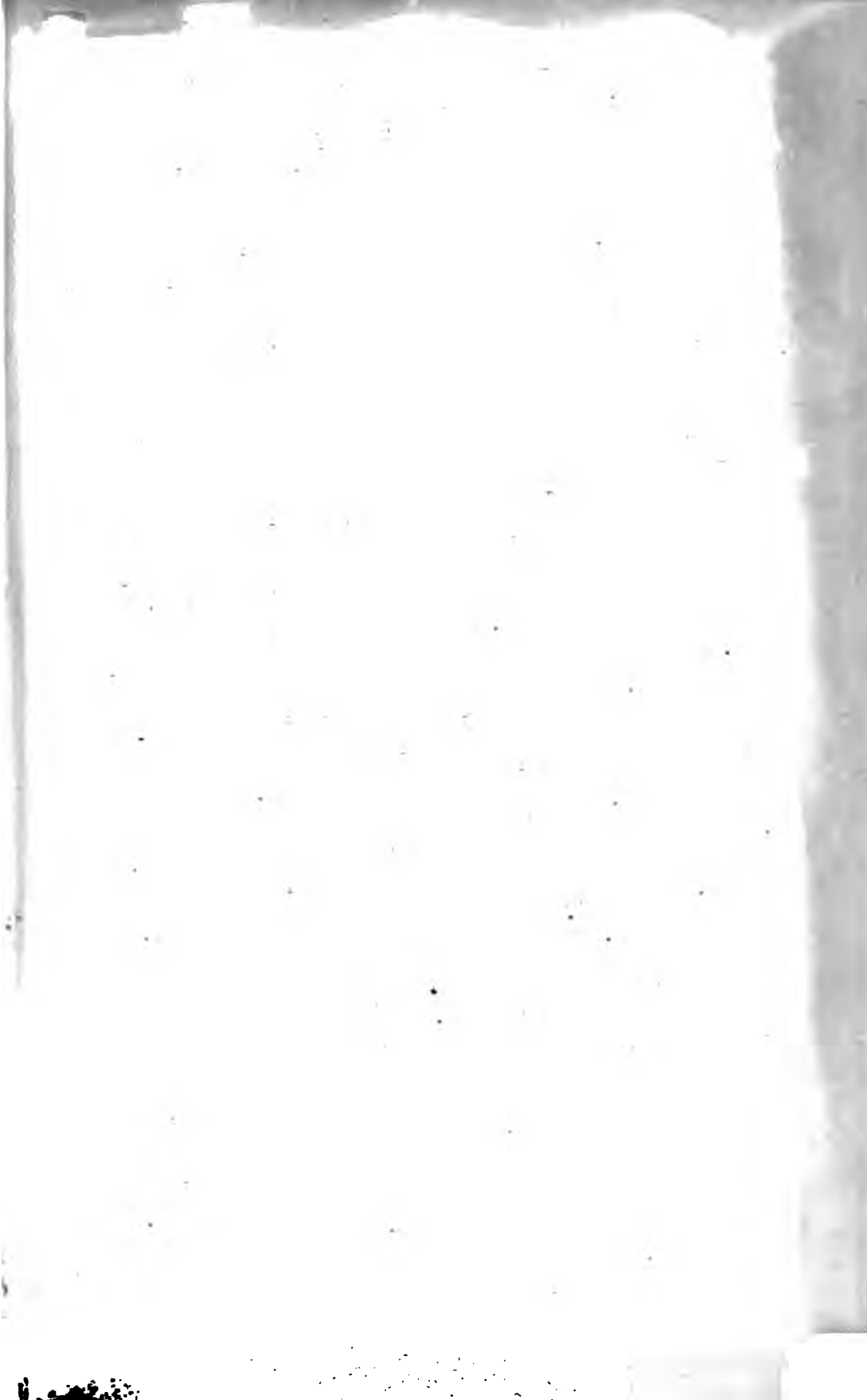
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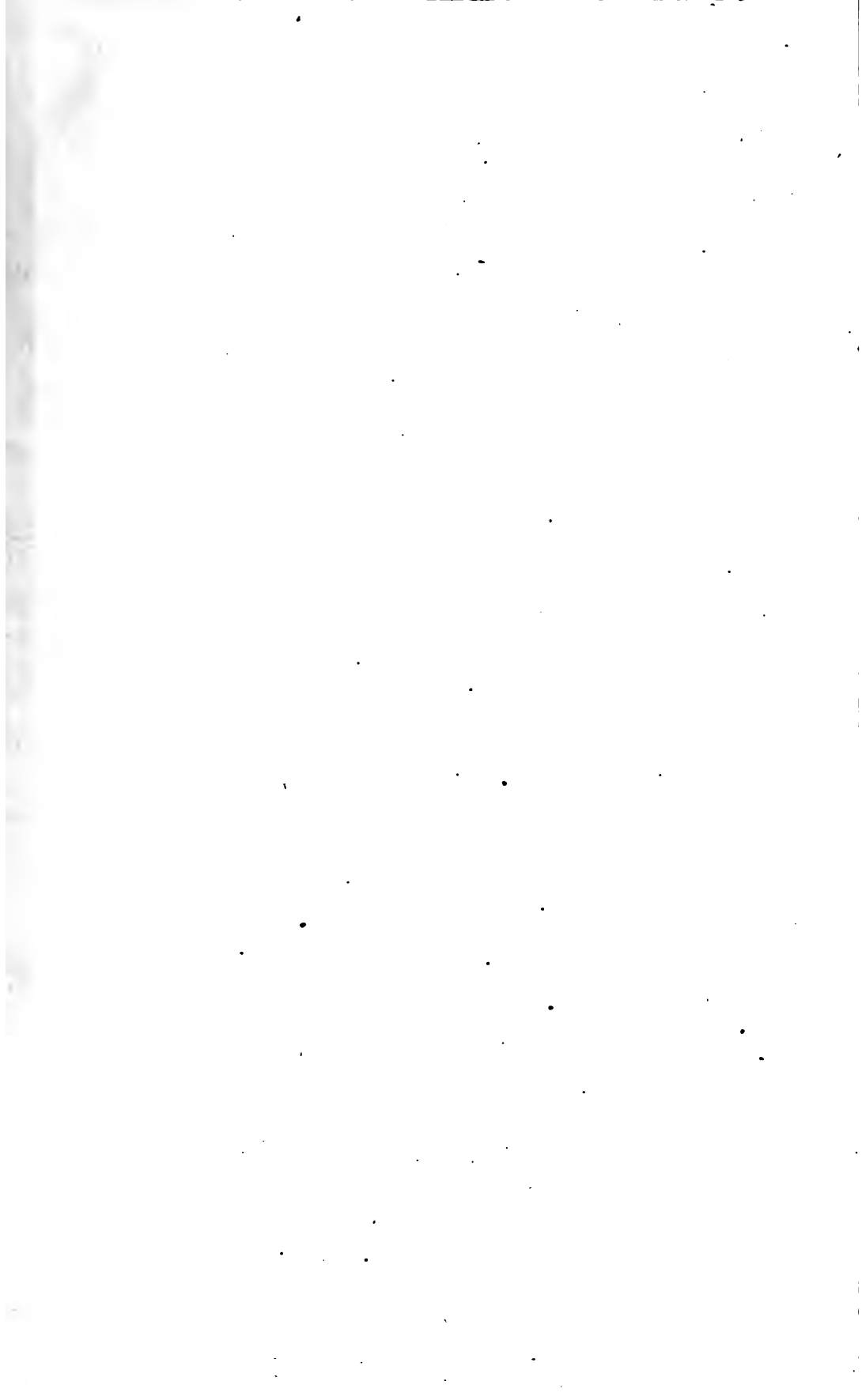
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
High Court of Chancery,
FROM THE YEAR M DCC LXXXIX TO M DCCC XVII.

WITH A DIGESTED INDEX.

BY FRANCIS VESEY, JUN. ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

In Twenty Volumes.
VOL. XVIII.

M DCCC XI....M DCCC XII. LI AND LII GEO. III.

FROM THE LAST LONDON EDITION, WITH THE NOTES OF FRANCIS VESEY, JUN. ESQ.
AND THE EXTENSIVE ANNOTATIONS OF JOHN E. HOVENDEN, ESQ.
OF GRAY'S INN, BARRISTER AT LAW.

THE WHOLE EDITED,
WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,
BY
CHARLES SUMNER, ESQ.

Omne jus, quod est certum, aut scripto, aut moribus constat. Dubium aequitatis regula examinandum est. Quae scripta sunt, aut posita in more civitatis, nullam habent difficultatem: cognitionis sunt enim, non inventionis. At quae consuetudinum responsa explicantur, aut in verborum interpretatione sunt posita, aut in recti pravique discrimine. *Quintilian, de Jure Civili.*

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LORD ELDON, Lord Chancellor.

SIR WILLIAM GRANT, Master of the Rolls.

SIR VICARY GIBBS, Attorney General.

SIR THOMAS PLUMER, Solicitor General.

CASES IN CHANCERY, ETC.

50 GEORGE III. 1811.

WOOD, *Ex parte* (1).

[1811, FEB. 5, 6.]

PROTECTION of Commissioners of Bankruptcy, granted at a private meeting, on the application of the bankrupt the day after he was served with notice, and before the first public meeting, good.
Order on the Plaintiff in the action to discharge the bankrupt; and the officer to pay the costs.
Costs against an officer, violating the privilege of Parliament from arrest, [p. 3.]

THE Petition stated, that a Commission of Bankruptcy issued against the petitioner Alfred Wood and his partners William Andrew Wood and John Birch, of Manchester, cotton merchants; dated the 22d of December, 1810; under which they were duly declared bankrupts; and by the summons of the Commissioners, dated the 2d of January, 1811, the bankrupts were required to surrender themselves to the said Commissioners or the major part of them forthwith, and on the 19th and 21st days of January, 1811, and the 16th of February next, at the George Inn, Manchester, to be examined by the said Commissioners touching the discovery and disclosure of their estate and effects. The petitioner in pursuance of the said summons surrendered himself to the major part of the Commissioners on the 3d of January, 1811, the day after it was served on * him; and submitted to be examined, &c.; [* 2] a memorandum of which surrender and submission was indorsed by the Commissioners on the said summons to surrender. On the 6th of January the petitioner was arrested at the suit of George and William Shaw by writ of Latitat; and though he produced the summons and memorandum, signed by the Commissioners, and claimed to be discharged, the officer persisted in detaining him;

(1) 1 Rose's Bankrupt Cases, 46.

and on the 14th of January he was committed to the castle of Lancaster.

The Petition prayed an Order, that the petitioner shall be discharged from the custody of the gaoler of Lancaster at the suit of George and William Shaw at the expense of the officer.

The Commissioners by their certificate stated, that on the 2d of January they declared the parties bankrupts; and appointed the days of meeting; and on 3d of January, William Andrew Wood and Alfred Wood surrendered themselves in pursuance of the Commissioners' summons to them at a meeting, fixed by the Commissioners at the request of the said bankrupts for the purpose of taking their surrender; and submitted themselves to be examined, &c.

Mr. *Leach*, in support of the Petition, no one appearing against it, obtained an Order upon the Plaintiff in the action to discharge the Petitioner, and upon the Officer to pay the costs of the discharge and of the Petition.

Mr. *Richards*, on the following day produced an affidavit by the officer; stating, that he was advised, that there is no decision as to the validity of a protection, granted at a private meeting; that having arrested the bankrupt on the 4th of January, the day before the * advertisement in the Gazette, and the summons [*3] being shown to him, he consulted the Plaintiff's attorney; who threatened him with an action for an escape; and the Counsel, who was consulted, recommended him, as the question was undecided, and doubtful, to persist in the arrest.

LORD CHANCELLOR [ELDON].—I ordered the officer to pay the costs; the bankrupt being clearly, by analogy to other cases, whether within the terms of the Act of Parliament, or not, entitled to his discharge; and therefore to be indemnified against the expense, occasioned by the arrest. The exact case occurred lately in the House of Lords. An attorney had arrested a Peeress, entitled to privilege of Parliament. In the transaction he had done nothing, which did not appear, according to his notion of the Law, to be his duty. His conduct was marked with great propriety: but the rule is, that he, who violates the privilege of a person from arrest, especially in the instance of a bankrupt, must indemnify him against the expense. If it will be any satisfaction to the officer, who has had the misfortune to get into this situation, I have no difficulty in saying, he has acted rightly and worthily: but the bankrupt must not be put to the expense of replacing himself in that state of freedom from arrest, to which he was entitled from the moment he received the protection of the Commissioners.

The Order therefore stood, as it was pronounced (1).

1. THIS case is likewise reported in 1 Rose, 46.

2. As to the privilege of a bankrupt from arrest, see, *ante*, the notes to *Ex parte Hawkins*, 4 V. 691.

(1) Previously to this decision considerable difference of opinion prevailed upon the point, whether a bankrupt could receive protection by a surrender before

the first public meeting. Mr. Christian in his valuable work (*Origin, Progress, and present practice of the Bankrupt Laws*, 1st vol. p. 132,) has stated

* the reasons against the validity of such a protection: in effect, 1st, that [* 4] the terms of reference in the 5th section of the Act 5th George II. c. 30 (now repealed) "having surrendered as aforesaid," and "such summons or notice," can apply only to a surrender after, and in consequence of, the notice, that the party is declared bankrupt, in the 1st section directed to be left at the bankrupt's place of abode, or to be served personally, if he is in prison; and the notice to be published in the London Gazette, that the Commission has issued, and of the time and place of meeting: 2d, that the submission to be examined must mean at a time and place, advertised for creditors to attend: 3d, that the protection for a period, exceeding forty-two days, is a violation of the language of the Act; 4thly, that the protection is directed to be given *in order to his attendance* upon his assignees; who are not chosen for some time after the commencement of the forty-two days: 5th, the evidence of collusion; where the bankrupt appears, and claims protection, immediately upon the adjudication.

The following are the principal reasons, that seem by a fair construction of the Act of Parliament to support the practice, which has now the sanction of high authority; to take the surrender upon the bankrupt's application at any time after the declaration of bankruptcy.

The 5th section of the Statute 5th George II. c. 30, directing "that the bankrupt shall be free from arrest in coming to surrender, and from the actual surrender of such bankrupt to the said Commissioners for and during the said forty-two days" (mentioned in the 1st section,) in terms applying to the full period, upon general principles of construction supposes a surrender previous to its commencement: and cannot, without some violence to language, be understood as the remainder of the time from the first public meeting; necessarily short by some days of that full period, described in terms intelligible and plain. A remarkable difference of expression occurred in the preceding part of the same section, * giving the bankrupt liberty to inspect his books, not "for and during" [* 5] but at "all seasonable times *before the expiration of the forty-two days*:" correctly marking the distinction, that during a part of the period there would not, except in the case of a provisional assignment, be assignees, in whose presence, or by whose authority, the inspection was to be had. The subsequent words "and in order thereto," which, understood as relating to the bankrupt's attendance on his assignees, would raise the same objection to a surrender at the first public meeting, referred with more propriety to the immediate antecedent, "the better to enable the bankrupt to make a full discovery."

Such being the plain interpretation of the 5th section, there was nothing in any other part of the Act, necessarily requiring a construction, not merely strained, but perfectly inconsistent with that. The qualification as to the manner of giving notice was added in the 1st section for very special purposes; that the creditors should be distinctly apprised of the period, within which they would have the opportunity of proving their debts, and examining the bankrupt; for the more important object of insuring to the bankrupt notice, and marking with precision the time, when he would incur the severe penalty, imposed on his omission to surrender. The reference in the 5th section, if applied to the notices, mentioned in the 1st, might be well understood without including the qualification, as to the mode of giving notice, added with a particular view to the direct objects of the 1st section; having no connection, and clearly inconsistent, with the provisions of the 5th; but, attending to the expired Act 5th George I. c. 24, s. 1, the foundation of the argument from this supposed reference wholly fails; and the cause of the difficulty in construing the subsequent Act is obvious: the adoption almost in terms, of the clause, imposing penalties upon a violation of the protection; not adverting to the important change in its nature and limits. The former Act giving the protection only "in going to, staying with, or coming from, the said * Commissioners, in case such bankrupt shall attend the said Commissioners, *in obedience to any notice or summons from them,*" [* 6] *such summons or notice* was the proper evidence, as it was the sole basis of the protection, granted upon attendance in obedience to it under that Statute: but those terms are perfect irrelevant to the more beneficial and extended protection, to which the latter Statute gave the bankrupt a positive right, not depending upon

any summons or notice to attend the Commissioners; and the case *Ex parte Leigh*, 1 Glyn & Jam. 264, has sanctioned this construction. The clause, which, as it stood in the prior Act, evidently had relation to the particular notice or summons immediately preceding, not to the notices, previously mentioned in the first enacting part of the section, was inadvertently copied into the subsequent Act, with this only difference, that the notice or summons is there described as signed by the Commissioners or Assignees: a notice or summons signed by the Assignees, not being before mentioned.

The description in the 2d section of the Statute 5th George II. "the said forty-two days so appointed as aforesaid for the bankrupt to surrender and conform as aforesaid," may be referred to the case, supposed by the first section, of a bankrupt deferring his surrender: and is not inconsistent with a voluntary surrender in the first instance. The surrender to the Commissioners is not required to be in the presence of creditors. It is rather a preliminary, private, transaction; indicating the bankrupt's submission; who is not expected at an early period to be prepared to go into the examination; and creditors are never permitted prematurely to compel him.

The objection from the appearance of collusion is not so easily answered; but, though it must be admitted, that this is too frequently obvious, it is by no means a necessary inference. From the uniformity of time and place, and the facility of obtaining intelligence, when and where Commissions are opened, it is not difficult to suppose a person, apprehending such a proceeding, taking the means of ascertaining the fact; * and reluctantly claiming the benefit of a process, which he cannot resist. This objection would be easily removed by appointing a meeting on the day after the declaration of bankruptcy, (as in *Wood's Case*), for the purpose of receiving the surrender; which, if required by the bankrupt, could not be refused: but the prevailing practice is permitted by Commissioners from the proper motive of avoiding expense.

If the construction, which this reasoning attempts to support, corresponds with the letter, it is surely most conformable to the spirit, of the law. Equality among the creditors is the general principle of the Bankrupt Law. With that view from the moment, when the declaration of bankruptcy ascertains, that the Commission is to proceed, which may finally supersede the private remedy of each individual, means are provided, by which the bankrupt, not being then in custody, may be protected for a certain period from the arrest of any one creditor for the benefit of all; not however, in that stage, interfering with a creditor, who has so far advanced his legal right, as to have the bankrupt then in custody. Is it possible to attribute to the Legislature an object so capricious and irrational, that several days, always including a portion of the forty-two, "for and during" which the bankrupt is by express declaration free from arrest, are without an assignable motive to be lost; while the bankrupt, who might be actively employed for the benefit of his creditors in arranging his affairs, driven from his home, and deprived of his property, is evading the pursuit of some one creditor, who, against the general spirit of the Bankrupt Law, seeks to gain an advantage over the others, which he can obtain only in the interval before the first meeting? That such was not the object is evident by tracing the difficulty to its true source, the misapplication of terms, used in the expired Act of George I. to a different state of circumstances, with which they have no connection. The Statute of 6 George IV. c. 16, (see s. 97,) has not made any alteration in the law upon this subject.

It may be useful here to notice a late decision of Lord Eldon, *Ex parte Russell*, * post, Vol. XIX. 163; 1 Rose, 278, that a bankrupt, attending the Commissioners under their summons, is protected even from the process of the Crown as a witness or party attending a Court of Justice; if not under the Statute; and, if, according to Lord Coke, (11 Co. 69 to 75, *Magdalen College Case*) the rule, that the Crown is not bound by general words of an Act of Parliament, admits limitation from the implied intention, the nature and object of the Act, it is difficult to conceive, that the Legislature could mean to place the bankrupt in such a situation, exposed to any civil process, while attending in obedience to the Act of Parliament, under the penalties of imprisonment and death, (since mitigated to transportation, or imprisonment, by Statute 6 George IV. c. 16. s. 112.) The Lord Chancellor however distinctly held, that the Crown not being named in that Statute, cannot be brought within it by implication. *Ex parte Temple*, 2 Ves. & Bea. 391; 2 Rose, 22.—Veszey.

CHAVE v. FARRANT.

[ROLLS.—1810, Nov. 20.]

IMPLIED satisfaction of a debt from a father to his child by a marriage portion of a greater amount (a).

JOHN BROOM by his Will, dated the 18th of July, 1786, gave to his grand-daughters Mary, Sarah, and Betty, Farrant, and to each child, that shall or may hereafter be born of his daughter Sarah Farrant, and living at his decease, the sum of 150*l.*, to be paid to each of them by his executors within six months next after his decease; to whom he gave and bequeathed the same accordingly.

The testator died on the 20th of July; leaving the three grand-daughters named in the Will, all infants. John Farrant, their father, died in 1807; having by his Will devised his real estates to his sons, with limitations to their children in tail and the ultimate remainder to his own right heirs; subject to a trust term of five hundred years, to raise certain legacies and sums of money, and also such farther sum of money as should be [* 9] sufficient to pay all his just debts, whether on bond, simple contract, or otherwise, after applying his goods and chattels, and the part of his personal estate, after bequeathed in discharge of such legacies and debts, as far as the same would extend; and he gave all the residue of his personal estate to his executors upon trust to apply the same in discharge of his legacies and debts.

The Bill was filed by the three grand-daughters of the testator Broom, with their husbands, claiming their legacies of 150*l.* with interest under his Will.

The answers by the executors, the widow and sons of Farrant, represented, that John Farrant maintained, clothed and educated, the Plaintiffs, his daughters, at an expense much exceeding their legacies under the Will of their grand-father; and he also gave to or in trust for each of them a marriage portion of 1000*l.*; and no demand was made by any of them in his life-time: therefore the Defendants insist, that the Plaintiffs are barred of all claim to recover the legacies under their grand-father's Will.

Sir Samuel Romilly and Mr. Shadwell, for the Plaintiffs.

The MASTER OF THE ROLLS [SIR WILLIAM GRANT].—Upon looking into the settlements I find nothing, from which any inference can be drawn as to the intention of the parties. In Mrs. Chave's her father covenants to pay 1000*l.* for the portion of his daughters. It does not appear that the husbands knew of the debts. My opinion

(a) In respect to satisfaction, see *ante*, notes (a), (b) and (c), *Hinchcliff v. Hinchcliff*, 3 V. 516; note (1) *Ellison v. Cookson*, 1 V. 110; *Richardson v. Elphinstone*, 2 V. 463.

The present inclination of Courts of Equity is against raising double portions; see note (a) *Baugh v. Read*, 1 V. 257.

is, that the father, giving the portion, must be taken as meaning to satisfy the debt he owed as executor of the grandfather.

[* 10] That is established in opposition to **Chidley v. Lee* (1) by the more recent cases *Wood v. Briant* (2) and *Seed v. Bradford* (3). In *Wood v. Briant* Lord Hardwicke says, "there are very few cases, where a father will not be presumed to have paid the debt he owes to a daughter, when in his life-time he gives her in marriage a greater sum than he owed her; for it is very unnatural to suppose, that he would choose to leave himself a debtor to her, and subject to an account."

In *Seed v. Bradford* those principles were adopted; and applied to that case: which was a bequest, not of a residue, but of a sum of money.

The Bill therefore, as far as it seeks payment of the legacies to Mrs. Chave and Mrs. Poole, must be dismissed: as to Mrs. Marson her portion is not given so as to amount to a satisfaction. As to her legacy therefore there must be a decree for payment (4).

SEE the notes to *Ellison v. Cookson*, 1 V. 100, and note 2 to *Barclay v. Wainright*, 3 V. 462.

CADMAN v. HORNER (5).

[ROLLS.—1810, Nov.]

MISREPRESENTATION, though in a slight degree, is an objection to a specific performance (a).

Distinction upon a Bill to rescind the contract (b).

THE Bill prayed the specific performance of an agreement, by which the Defendant contracted to sell the fee-simple of
[* 11] certain premises for the sum of *600*l.*, payable by instalments. The agreement was signed by both parties; and the Defendant having received part of the purchase-money, resisted

(1) Pre. in Ch. 228.

(2) 3 Atk. 521.

(3) 1 Ves. 501.

(4) *Ante*, *Hartopp v. Hartopp*, vol. xvii. 184; *Bengough v. Walker*, xv. 507, and the references in the notes, 510; i. 112, 259.

(5) *Ex relatione*.

(a) If a contract be unfairly obtained, or under suspicious circumstances, or if it be unjust or unconscionable to decree a performance of it; or if it would be a hardship for the defendant, a Court of Equity will not enforce it; see *ante*, note (d) and cases collected, *Mortlock v. Buller*, 10 V. 292.

As to the effect of mere inadequacy of consideration on specific performance, see note (a) *Coles v. Trecothick*, 9 V. 234a; note (a) *Moth v. Atwood*, 5 V. 845.

A mistaken opinion of the value of property, if honestly entertained, and stated as an opinion merely, can never be considered as a fraudulent representation. *Hepburn v. Dunlop*, 1 Wheat. 189; 1 Story, Eq. Jur. § 197, note.

(b) 1 Story, Eq. Jur. § 206; 2 ib. § 693.

the performance on the ground, that the Plaintiff, who was his agent, had misrepresented the value of the estate; producing evidence, that it was worth near 1200*l.*; also that, the Plaintiff had previously to the agreement represented to him, that the houses had been injured by a flood, and would require between 50*l.* and 60*l.* to repair them; whereas in truth the premises at the time of the contract required no more than forty shillings to put them in complete repair. No evidence of the value of the premises was entered into by the Plaintiff: but the Defendant in his answer admitted, that the clear yearly rent amounted to 40*l.*; and stated, that in 1805 he had purchased these premises for 700*l.*; and had afterwards expended 300*l.* in repairing them.

The MASTER OF THE ROLLS [SIR WILLIAM GRANT].—The evidence of the inadequacy of the price in this case is considerably shaken by the Defendant's admission of the clear rent of the premises. It is difficult to conceive, that he could be ignorant of the value; having so recently purchased the estate; and laid out money in the improvement of it; and it is not easy to comprehend his conduct: nor does misrepresentation by the Plaintiff in regard to what was requisite for the repairs of the houses by any means account for the disparity between the price, paid for the estate, and the sum, at which the witnesses value it: yet, as upon the evidence the Plaintiff has been guilty of a degree of misrepresentation, operating to a certain, though a small, extent, that misrepresentation disqualifies him from calling for the aid of a Court of Equity; where he must come, as it is said, with clean hands. He must, to entitle him to relief, be liable to no imputation in the transaction (1). This is not a case, *where the Court is called upon to rescind an [* 12] agreement, and to decree the conveyance, executed in pursuance of it, to be delivered up to be cancelled; which would admit a different consideration (2).

The Bill was dismissed without costs.

1. UNDER ordinary circumstances, and where no *mala fides* has been practised, mere inadequacy of consideration affords no sufficient ground for setting aside a contract; but the undervalue may be so gross as to afford, of itself, evidence of fraud: see, *ante*, note to *Crowe v. Ballard*, 1 V. 215, and note 5 to *Mortlock v. Buller*, 10 V. 292. The effect of fraud is, not to alter the agreement partially, but to vitiate it *in toto*. A party who has been guilty of any sort of misrepresentation is barred, personally barred, from all right to enforce a contract which that misrepresentation can have had any influence in inducing the other party to agree to: *Clermont v. Tasburgh*, 1 Jac. & Walk. 120; *Marquis of Normandy v. The Duke of Devonshire*, 2 Freem. 217; *Buxton v. Lister*, 3 Atk. 386; *Howard v. Hopkins*, 2 Atk. 371; *Young v. Clerk*, Prec. in Cha. 539. And a party who was deceived by false representations, and induced by such fraud to enter into a contract, may offer parol evidence for the purpose of getting rid of the contract altogether: *Winch v. Winchester*, 1 Ves. & Beat. 378; and see notes 2, 3, to *Calverly v. Wil-*

(1) *Viscount Clermont v. Tasburgh*, 1 Jac. & Walk. 112; *Wall v. Stubbs*, 1 Madd. 80.

(2) *Savage v. Brocksopp*, *post*, 335; *ante*, *Marquis of Townshend v. Stangroom*, vol. vi. 328, and the notes, 341; i. 226; *Lovendes v. Lane*, 2 Cox, 263.

hams, 1 V. 210, with note 3 to *The Marquis Townshend v. Stangroom*, 6 V. 328; see, also, note 8 to the last-cited case, that there may be many instances in which a court of equity will neither lend its aid to enforce specific performance of an agreement, nor, on the other hand, decree the agreement to be delivered up.

2. There are numerous cases, no doubt, in which it has been held, that where parties are dealing for an estate, they may put each other at arm's length; the purchaser may use his own knowledge, and is not bound to instruct the vendor as to the value of the property. Thus, if an estate be offered for sale, a person who knows there is a mine under it may treat for the purchase, and supposing no inquiry to be made by the other party as to that matter, there is no obligation to give him any information respecting it: but a very little is sufficient to affect the application of that principle: if a single word be dropped which tends to mislead the vendor, the rule above stated will not be allowed to operate: *Turner v. Harvey*, 1 Jacob's Rep. 178: and, in the case just cited, the Lord Chancellor decreed the contract to be delivered up.

3. In the principal case, it was observed, that it might admit consideration, whether, after a conveyance executed in pursuance of a contract induced by some degree of misrepresentation, such formal conveyance ought to be delivered up to be cancelled: and in *Legge v. Croker*, 1 Ball. & Beat. 516, it was decided, that the leases there in question should stand as they were executed, though the lessor, pending the treaty, had made an assertion respecting the property which was unfounded; the assertion, however, having been made in consequence of a justifiable error of opinion, not with an intention wilfully to misrepresent the fact.

COOKE v. CLAYWORTH.

[ROLLS.—1811, FEB. 13, 14, 18.]

GENERAL rule that a Court of Equity will not assist a person, who has obtained, from a person intoxicated, or wishes to get rid of, an agreement, or deed, on the mere ground of intoxication.

Exception, where any contrivance was used to draw him in to drink; or any unfair advantage made of his situation: or that extreme state of intoxication, depriving a man of his reason: which even at law would invalidate a deed (a).

A single witness, not corroborated, not sufficient against positive denial by the answer (b).

THE Bill prayed, that an agreement in writing, executed by the Plaintiff, may be declared fraudulent and void, as against him; and may be decreed to be delivered up to be cancelled; and an injunction.

The Plaintiff by his bill represented, that on the 11th of June, 1807, he met by appointment at Spilsby in the county of Lincoln several persons; of whom he had made purchases; in order to pay them: one of those persons being the Defendant Taylor; and, after that business was concluded, the Plaintiff was prevailed upon to drink, until he was intoxicated; that in that state he left Spilsby about six in the evening, accompanied by Taylor; and they stopped at the house of the other Defendant Clayworth; to whom also the Plaintiff had a payment to make. They found him at home, *drinking with some other persons; and they all [* 13] continued drinking for a considerable time; the Plaintiff returning home about half-past two in a state of complete intoxication; and the agreement was obtained from him, while in that state, and utterly unable to understand, what he was doing.

(a) It is now settled that drunkenness is a complete defence to a contract; but the drunkenness must be so excessive and absolute as to suspend the reason for a time, and create impotence of mind, for "the merriment of a cheerful cup, which rather revives the spirits, than stupifies the reason, is no hindrance to the contracting of just obligations." Puffendorf, book 3, ch. 6, § 4; W. W. Story, Contr. § 27. Nor does it make any difference that the drunkenness was voluntary and wilful, for the legal theory is, that without the capacity of giving a deliberate assent, no contract can be made. Ibid.

Courts of Equity, on grounds of public policy, do not incline, on the one hand, to lend their assistance to a person, who has obtained an agreement or deed from another in a state of intoxication; and, on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed, merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or imposition practised. 1 Story, Eq. Jur. § 231, 232; *Campbell v. Ketcham*, 1 Bibb, 406; *White v. Cox*, 3 Hayw. 82; *Wigglesworth v. Steers*, 1 Hen. & Munf. 70; *Taylor v. Patrick*, 1 Bibb, 168. See also as to the effect of intoxication on contracts, *Barrett v. Baxton*, 2 Aiken, 167; *King v. Bryant*, 2 Haywood, (N. C.) 394; *Borroughs v. Richman*, 1 Green, 243; *Reinicker v. Smith*, 2 Har. & Johns. 423; *Arnold v. Hickman*, 6 Munf. 15; *Williams v. Inabnet*, 1 Bailey, 343; *Seymour v. Delancy*, 3 Cowen, 445; *Dorr v. Munsell*, 18 Johns. 430.

(b) For the reason of this rule, and the numerous authorities in illustration of it, see ante, note (b) *Mortimer v. Orchard*, 2 V. 243; note (c) *East India Co. v. Donald*, 9 V. 275.

The Defendants by their answer denied, that the Plaintiff was solicited to drink; stating, that he continued to do so of his own free will; and was disqualified from transacting business of difficulty and importance; that the agreement arose from Clayworth's stating a dispute with his landlord; who threatened to turn him out of his farm; upon which the Plaintiff made the offer. The answer then stated the agreement; which was most inaccurately expressed: in effect, that Cooke agrees to let all the lands and tenements he occupied in the parish of Brough, or elsewhere; and Clayworth and Taylor agree to take the land to rent for twenty years; to commence at Lady-day 1808; stating the terms; and that Cooke agrees to give possession at the time before mentioned: that it was signed by all the parties on the 11th of May, 1807; witnessed by Robert Marshall; that it was prepared by Marshall; but dictated by the Plaintiff: and was executed at twelve o'clock at night.

It was proved, that Marshall, a school-master, was called out of bed to prepare the agreement. There was much contradiction in the evidence as to the Plaintiff's situation: some of the witnesses stating, that he was in a high degree of intoxication; and came home in that situation about two in the morning: others representing him as perfectly sober and fully competent to transact business.

[* 14] *Sir Samuel Romilly and Mr. Horne, for the Plaintiff.—

This is an agreement, fraudulently obtained from a man, while in a state of intoxication; which is apparent on the face of the agreement; compared with the account, given by the Defendant, and the evidence. The evidence upon the face of the instrument is the strongest: the parts interpolated, making this a binding agreement upon the Plaintiff, as a demise, being in a different ink. Independent of the intoxication, a Court of Equity would not only refuse to perform such an agreement, but would decree it to be delivered up. This cannot be supported upon the principle, stated in *Cory v. Cory* (1), as a reasonable, proper, agreement; and there is evidence, that he was drawn in to drink; according to the distinction, taken in *Johnson v. Medlicot* (2). In that respect this is distinguished from the case of *Cragg v. Holme* (3); where the Court refused a specific performance of an agreement, made in a state of intoxication; though no advantage was taken: a Court of Equity not interposing on either side in the common case of intoxication: but, if the party is brought into that state by him, who obtains, and seeks advantage from, the agreement, the intoxication is part of the fraud; which gives the right to the relief.

(1) 1 Ves. 19.

(2) 3 P. Will. 131, note (a).

(3) At the Rolls, May, 1811. From a *ms.* note it was stated, that the Bill for a specific performance was dismissed without costs; though the Plaintiff had not contributed to make the Defendant drunk; or taken any advantage of his situation; and the Master of the Rolls said, he would not have decreed the agreement to be delivered up; that the Court would not act on either side.

The rule however against interposing on either side in the common case of intoxication cannot apply in this instance. This agreement, as it has been altered, though not so originally, amounts to a demise; and upon that ground the Lord Chancellor upon the terms of giving immediate possession, if the Bill should be dismissed, continued the injunction against an ejectment, brought by the Defendant. The Bill in truth therefore seeks to have delivered up, not an agreement, but a lease; which appears in evidence to have been converted into a lease from an agreement, after it was signed.

Mr. Hart, and Mr. William Agar, for the Defendant, distinguished this from a Bill for the performance of a contract; insisting, that to obtain this relief, the Plaintiff must show a specific fraud practised upon him; making it unconscientious to retain the effect of it: the rule being clear, that intoxication simply gives no protection; the responsibility is thrown upon the party himself, unless he can show, that undue advantage was taken of his situation by those, who brought him into it with a view to that advantage.

Feb. 18th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—Retaining the opinion which I stated in the case, that was alluded to in the argument, I think, a Court of Equity ought not to give its assistance to a person, who has obtained an agreement, or deed, from another in a state of intoxication; and on the other hand ought not to assist a person to get rid of any agreement, or deed, merely upon the ground of his having been intoxicated at the time (1): I say merely upon that ground; as, if there was, as Lord Hardwicke expresses it in *Cory v. Cory* (2), any unfair advantage made of his situation, or as Sir *Joseph Jekyll says in *Johnson v. Medlicott* (3), any contrivance or management to draw him into drink, he might be a proper object of relief in a Court of Equity. As to that extreme case of intoxication, that deprives a man of his reason, I apprehend, that even at Law it would invalidate a deed, obtained from him, while in that condition.

After a very attentive consideration of the evidence in this case I can find no ground, on which upon the supposed state of intoxication of the Plaintiff the Court could be warranted in decreeing this deed or agreement to be delivered up to be cancelled. There is a contrariety of evidence as to the fact of intoxication, upon which it is not easy for this Court to decide. There are three witnesses, who all swear, that at the time of execution the Plaintiff was perfectly sober and capable of business: Marshall indeed says, he was as capable of transacting business to any extent as ever he was in his life. Whatever difficulty I may have in believing this after all the other evidence, that has been produced, I should hesitate to determine a fact, so controverted, without the intervention of a Jury.

But, supposing the intoxication proved to a considerable extent,

(1) *Dunnage v. White*, 1 Swanst. 137.

(2) 1 Ves. 19.

(3) 3 P. Will. 130, note (a).

still the inquiry would remain, whether the conduct of the Defendants has been such as to furnish ground for setting aside this agreement. It is admitted, that there was no previous design in bringing about the meeting at the Defendant's house: the Bill stating, that the Plaintiff's calling there was the proposition of the Plaintiff to Taylor.

As to the Plaintiff's being drawn into drink by contrivance [* 17] and management, it is to be observed, that * the drinking was not introduced on account of his coming there, nor after he came there: but a company engaged in drinking, he joined them. One witness, Mary Hall, says, the Plaintiff was pressed, and almost forced, by Clayworth to drink; but her testimony not being corroborated by any other witness, cannot prevail against the denial of that fact by the answer (1).

As to the manner in which the treaty was introduced, Pedley, the only witness upon that, represents it as proceeding entirely from the Plaintiff; that the Defendant, so far from holding out any inducement, rather hesitated to accept the offer. There is no pretence, that the offer was in its own nature such as necessarily discovers absence of judgment in the person making, or a degree of unfairness in those accepting, it.

In this state of the evidence I cannot possibly hold, that the Plaintiff was by contrivance and management drawn in to drink; or that any unfair advantage was taken of his intoxication, to obtain an unreasonable bargain. As to the doubt appearing on the face of the paper, whether, as it stands, it contains what was dictated to the Plaintiff, read to him by Marshall, and afterwards by himself, the investigation of that point will be open at law upon the trial of any action, founded upon this instrument; and can be much better made there than here. Here indeed that has not been examined: it was only adverted to in the course of the hearing. That the paper was was not at first written as it now stands, is quite apparent; and it will be rather difficult for the witnesses, professing to have given a full representation of the transaction, to account for their entire

silence as to all, that must have been said, or done, before [* 18] the paper was brought * into its present state by the introduction of the first clause, and the consequential erasures and alterations. That however, as I have said, will be for another tribunal, and in the view I have taken of the case I can do nothing but dismiss the bill without costs, and dissolve the injunction.

1. A CONTRACT obtained by fraud and circumvention, from a person in a state of intoxication, is void in equity: *Butler v. Mulvihill*, 1 Bligh, 137: and Chief Justice Holt, in *Cole v. Robins*, (cited in Bull. N. P. 172), held that, at common law, to support a plea of *non est factum* to an action brought on a bond, evidence might be given, that the defendant, when he signed the instrument, was so drunk as not to know what he did. Lord Ellenborough, also, is reported to have laid down the law quite as broadly in *Pitt v. Smith*, 3 Campb. 34, holding, that, as a party in a state of complete intoxication cannot have "an agreeing mind," there

(1) See *ante*, *Evans v. Bicknell*, vol. vi. 174; *The East India Company v. Donald*, ix. 275; and the note, ii. 244, *Mortimer v. Orchard*.

could be no agreement between parties, if the one sought to be charged was in such a state, when he signed the paper relied on as an agreement. In the case last cited, however, it may be collected from the report, that the defendant got drunk in the company of the plaintiff; and, although this fact is not stated to have been adverted to in the judgment, in qualification of the generality of the expressions there reported to have been used, still it may not improbably have had some weight in the learned judge's mind, as strengthening the presumption of fraud. For Lord Coke, in his commentary on the 405th section of Littleton, says, that although a drunken man is, for the time, *non compos mentis*, yet this shall give no privilege or benefit to him or his heirs, when it appears that it was by his own vicious act of drunkenness he deprived himself, for the time, of memory and understanding: and the same doctrine is repeated in *Beverley's case*, 4 Rep. 125. At all events, whether the rule at law be settled or not, it seems established, not only by the principal case, but by *Johnson v. Medlicott*, 3 P. Wms. 130, and by *Cory v. Cory*, 1 Ves. Sen. 19 (which last cited case, though it was called a "strong one" in *Stockley v. Stockley*, 1 Ves. & Beat. 31, was by no means controverted; on the contrary, its principle was then acted upon,) that a party ought to receive no aid from equity to set aside an agreement, upon the mere ground that he was drunk when he entered into it, unless his state of intoxication was such as to amount to a complete deprivation of reason. The older case of *Rich v. Sydenham*, 1 Ch. Ca. 202, is far from being in contradiction of this rule of equity; in that case, the defendant was relieved from a security which was *gotten from him* when he was drunk; but the form of this expression, and, still more unequivocally, the context of the report, clearly show, that the security was extorted by the mal-practices of the plaintiff. And it is quite clear that, not only when it can be distinctly brought home to a plaintiff, that he assisted in seducing a defendant into a drunken debauch, during which he obtained any contract from him, such contract cannot be supported in equity; but, also, that whenever a person's habitual addiction to intoxication renders him extremely subject to imposition, such habits, though not carried to an excess constituting absolute incapacity, lay a ground for strict examination, whether any instrument executed by him does not, in itself, contain evidence that advantage was taken of those habits: *Say v. Barwick*, 1 Ves. & Beat. 199; *Dunnage v. White*, 1 Swanst. 150; *Mountain v. Bennet*, 1 Cox, 353; *Faine v. Brown*, cited in 2 Ves. Sen. 307, and in 2 Ball. & Beat. 287. Indeed, a constant habit of intoxication, as laying the party open to every artifice of fraudulent imposition, may even be the foundation of a commission in the nature of a writ *de lunatico inquirendo*: *Anonymous case*, cited in 8 Ves. 67. And, at common law, a rule may be made for defendants to show cause why an information should not be exhibited against them for a misdemeanor, it being alleged, that they are using artifices to induce a person under their influence to make a will, such person being habitually addicted to, and disordered by, intemperate drinking: *Re v. Wright*, 2 Burr. 1100.

2. Where the testimony of a single witness is corroborated by collateral circumstances, it may prevail against the oath of a defendant: see, *ante*, note 2 to *Mortimer v. Orchard*, 2 V. 243.

LAVENDER, *Ex parte* (1).

[1811, MARCH 21.]

COMMISSION of Bankruptcy superseded, to defeat a prosecution for omitting to surrender under circumstances of erroneous advice: no fraud; and another Commission issued proceeding.

THE prayer of this Petition was, that a separate Commission of Bankruptcy against the Petitioner might be superseded. The bankrupt had not surrendered under that Commission: but a joint Commission being taken out afterwards against him and another person, he surrendered and passed his examination under that: and was immediately apprehended, taken before a magistrate, and committed for the felony by not surrendering to the former Commission; and the prosecution was actually instituted.

The Petitioner by his affidavit stated, that he was advised, that a separate Commission could not be taken out by a joint creditor (2); that he had no criminal or fraudulent intention; but under an opinion, that the advice he had received was legal and proper, and from that cause alone, he was induced not to surrender.

Sir *Samuel Romilly*, and Mr. *Hall*, in support of the Petition, admitting, that it is now settled, that a separate Commission [* 19] * may issue on the Petition of a joint creditor, observed, that it was a point of some novelty; introduced by the case *Ex parte Elton* (3); and pressed, that under these circumstances, the mistake of a Solicitor, without any intention of fraud, and a joint Commission, free from objection, subsisting, the separate Commission should be superseded; as was done by Lord Macclesfield (4).

Mr. *Parker*, for the assignees, suggested, that the advice was given for an interested motive; with a view to a joint Commission.

The Lord CHANCELLOR [ELDON] at first hesitated; observing, that, though the advice might have been given with the view to a joint Commission, if the bankrupt acted honestly under it from the influence of that impression alone, the prosecution was very harsh, yet that ignorance of the law would not protect him upon the trial of an indictment; though certainly a pardon would be granted in such a case. His Lordship however at length upon the authority referred to made the Order, superseding the Commission, with costs out of the estate (5).

1. This case is likewise reported in 1 Rose, 55.

2. The consequences of a bankrupt's non-surrender within the regular time are,

(1) 1 Rose, Bank. Cas. 55.

(2) *Ante*, *Ex parte De Tastet*, vol. xvii. 247; *Ex parte Ackerman*, xiv. 604, and the references in the note, 605.

(3) *Ante*, vol. iii. 238; see the note, 243.

(4) See *Ex parte Wood*, 1 Atk. 221.

(5) Generally a Commission cannot be superseded before surrender: *ante*, *Ex*

by late enactments, less highly penal than they were formerly; and the Lord Chancellor is fully empowered to enlarge the time for a bankrupt's surrender: see, *ante*, the note to *Ex parte Rickells*, 6 V. 445.

BOULTBEE v. STUBBS.

[* 20]

[1810, DEC. 20. 1811, JAN. 23, 25; APRIL 11.]

CREDITOR, having among other securities a bond with a surety, taking a mortgage from the principal debtor, and agreeing to receive the residue by instalments, secured by warrant, &c. without prejudice to any security he now holds, Injunction granted against suing the Surety (a).

Bankruptcy of acceptor does not dispense with notice to the drawer (b), [p. 21.] Composition with reserve of the remedy against Sureties valid; but must plainly appear, [p. 22.]

THOMAS BOULTBEE, being called upon by the Defendant, who was his banker, for security, procured his brother Charles Boulton, as surety to join him in a bond for 10,000*l.*; with a stipulation, that Charles, the surety, was only to be liable to the extent of 6000*l.*; if upon the account that amount should be due. Upon a subsequent settlement of the account, the balance, due to the banker, appearing to be 9500*l.*, Thomas Boulton gave him a mortgage for 4000*l.*: it was agreed between them, that the residue should be paid by instalments: and a warrant of attorney was given to confess judgment for the balance, but expressly without prejudice to any security Stubbs now holds for the said sum, or any part thereof. The surety, being afterwards sued, filed the bill; and moved for an injunction.

Mr. Hart, Serjeant Palmer, and Mr. Heald, in support of the Injunction, cited *Rees v. Berrington* (1), and *Law v. The East India Company* (2).

Sir Samuel Romilly and Mr. Wingfield, for the Defendant.

The Lord CHANCELLOR [ELDON].—The law of this case is perfectly clear. The circumstances upon the face of the bond are these.

The Defendant, a banker, unwilling to give Thomas Boulton credit to the amount he wished upon his own personal security, or upon the credit and security of the different * bills [* 21] and notes, which he should pay into the Bank in the course

parte Jones, vol. xi. 409; *Ex parte Stokes*, vii. 405; see the notes, and another case of Exception, *Ex parte Whittington*, Buck. 235.

(a) As to the acts of a creditor which will discharge a surety, see *ante*, note (a) *Rees v. Berrington*, 2 V. 540; *Nisbet v. Smith*, 2 Bro. C. C. (Am. ed. 1844.) notes (a) and (b).

(b) Neither the death, nor the bankruptcy, nor the known stoppage or insolvency of the drawee, will constitute any sufficient excuse for not making a due presentment of the Bill, or for not giving due notice of the dishonor of the Bill. Story, Bills, § 318; Bayley, Bills, ch. 7, § 1, p. 251, 252; Chitty, Bills, ch. 8, 360, (8th ed. 1830.)

(1) *Ante*, vol. ii. 540; see the note, 544.

(2) *Ante*, vol. iv. 824.

of his dealing, required a bond for 10,000*l.* from him, and from his brother, as surety; under which the surety was to be liable only to the extent of 6000*l.*; if upon the account that amount should be due. On the settlement of accounts a balance of 9500*l.* appearing to be due, it is clear, that, if Thomas Boulton, the principal debtor, had given a mortgage for 3500*l.* that security might have been given, and taken, without prejudice to the bond: but a mortgage was given for 4000*l.*; reducing the debt therefore below 6000*l.*; and as to the residue of the debt it was provided, that it should be paid by certain instalments, fixed by the instrument.

The consequence of this transaction in equity is, that, the surety continuing liable for the sum of 5500*l.* remaining due upon the settlement of accounts, and the creditor agreeing with the principal debtor to postpone his remedy, changing his immediate right to sue to a right to call for certain instalments, the effect of that agreement is, that in equity the right against the surety is gone. It is in vain to say, the indulgence to the principal by taking the mortgage, and giving time, may be for the benefit of the surety. It is in most cases for the advantage of the surety; but the law takes so little notice of that circumstance, that if the acceptor of a Bill becomes bankrupt, the holder must give notice to the drawer; as another person has no right to judge, what are his remedies; and the original implied contract being, that, as far as the nature of the original security will admit, the surety, paying the debt, shall stand in the place of the creditor.

The cases that have been alluded to, and there is a great [* 22] variety of them, are those of a creditor, entering * into a composition with the person, liable in the first instance; with a stipulation, that it shall not prejudice his remedies against others, who are liable as sureties. The ordinary case is that of compositions upon Bills. The answer given is, that by the agreement, reserving the creditor's remedy against sureties, the situation of the surety is not varied; and this doctrine has been held at law as well as here; but I agree, that a stipulation of that kind is in many cases so very absurd, that it must be seen plainly: and the true question is, whether these words in the warrant of attorney, "without prejudice to any security," mean, that this bond was to be saved against the surety; the demand upon which was intended to be arranged by that very transaction: or, whether the meaning of those words is not, that, the principal debtor being in the habit of giving securities to the creditor from time to time, this transaction should liquidate the matter of the bond; but should not prejudice the banker's right as to other securities in his hands. If that is the meaning of this transaction, it puts an end to the right against the surety: if, on the other hand, the object was to give as extensive a remedy as was given in *Mr. Burke's Case* (1), then that case and many others must govern this. My opinion is, that it was not intended to save this bond

(1) Cited by the Lord Chancellor, *ante*, vol. vi. 809, *Ex parte Gifford*.

among other securities ; the saving of which securities will give a reasonable interpretation to these words in the Warrant of Attorney.

1811, Jan. 23d. The Motion to dissolve the Injunction was renewed.

Mr. Hart, Serjeant Palmer, and * Mr. Heald, for the [* 23] Plaintiff.—The provision of this Warrant of Attorney, that it shall be without prejudice to any security the Defendant holds for the said sum, or any part thereof, is singular, if he is at liberty to the extent he contends. It is clearly decided, that a discharge of the principal by contract discharges the surety ; and that rule has never been controlled by such a general reservation of securities ; which cannot have the effect of saving the right of the creditor to proceed against the surety, and by that circuitry obtain payment of the debt, from which the principal debtor was discharged. In *Burke's Case*, mentioned by your Lordship, the saving in the discharge had the effect of leaving the creditor at liberty to proceed against the surety : but that has no application to a general discharge of the principal debtor by agreement between him and the creditor ; to which the surety was no party ; of which he had no notice : who was treated as a person entirely unconcerned and unconnected with the transaction.

The principle, resulting from *Ex parte Rushforth* (1), is, that whatever benefit is contracted for as between the principal debtor and the creditor is considered as contracted for on behalf of the surety to the same extent. This creditor, contracting for farther security, in addition to those he has, engaging not to proceed against the debtor, and extending the period of payment by instalments, must be understood as contracting not to take any proceeding, that may mediately or immediately call upon the debtor in any other manner. The alteration of the time and mode of payment, to which the creditor has consented, cannot have effect ; unless it extends to the surety ; who, if compelled by an action to pay the debt, could immediately recover against the * principal debtor. That [* 24] clearly could not be the intention of these parties : otherwise this contract for additional security can mean nothing : or rather would have the effect of disabling the debtor to pay the debt ; the discharge of which is his professed object ; divesting out of him the estate, which forms the fund for payment, without obtaining that object. Upon the Defendant's construction of these words he might the day after this transaction have arrested the principal debtor upon the bond. The security is not in substance prejudiced by this delay of payment. At least the Plaintiff ought not to be called upon, until the principal has made default in payment of the instalments.

Burke's Case is merely that of two sureties ; one discharged by the creditor, proceeding against the other ; who called upon the Court

(1) *Ante*, vol. x. 409.

to consider him as discharged by the act of the creditor; and he was discharged upon the principle of *Nesbit v. Smith* (1), and *Rees v. Berrington* (2). In *Wright v. Simpson* (3) your Lordship lays down the principle, that the benefit for which the debtor contracts on his own account, he contracts for on account of the surety; and the creditor is bound to the same extent as to both. Wherever therefore the principal gets time, the surety is entitled to the benefit of it: else he is precluded from the common equity of compelling the principal to discharge him by paying the debt. Another general principle is, that the surety is entitled to the benefit in all transactions between the creditor and the principal debtor. The creditor is not bound to proceed; but may remain passive: if however he does proceed, and afterwards gives time, the surety [* 25] must have the * benefit of that; as your Lordship states (4) in *Wright v. Simpson*.

The relief of the surety is also supported by *English v. Darley* (5).

Sir Samuel Romilly and Mr. Wingfield, for the Defendant.—All these cases of relief to the surety have gone upon this; that time was given to the principal. In this case judgment being confessed under the Warrant of Attorney expressly without prejudice to any security the creditor holds, the surety sustains no injury whatsoever. He might have called upon the creditor to enforce his demand against the principal debtor equally after his judgment confessed, as before. In all the cases referred to the creditor had put that out of his power; and upon that alone the surety was discharged. This transaction, by which the creditor obtains part-payment, and a mortgage, is highly advantageous to the surety; relieving him in a very considerable degree from his obligation, leaving all the remedies he could have called upon the creditors to enforce against the principal debtor still subsisting; and under these circumstances, the surety sustaining no delay or injury, and having all the benefit of this transaction, claims in a court of Equity to be wholly discharged upon the strict, technical, rule, that time, given to the principal without consent of the surety, discharges the surety. Your Lordship's words in *Wright v. Simpson* are not to be understood, that, having brought an action, the Plaintiff must proceed with the utmost rigor; referring to the decisions, establishing the principles, that have been stated.

[* 26] In *Rees v. Berrington* this * Court would have enjoined the creditor, proceeding upon the bond, though at the instance of the surety. Is that the case here? Would this Court have restrained a proceeding upon the bond against the express contract, reserving the right to proceed upon it notwithstanding the new secu-

(1) 2 Bro. C. C. 579.

(2) *Ante*, vol. ii. 540.

(3) *Ante*, vol. vi. 714; see 734; x. 414, *Ex parte Rushforth*.

(4) *Ante*, vol. vi. 734.

(5) 2 Bos. & Pul. 61.

urity; and no time being given; by which the surety could be affected either in Equity or at Law?

The Lord CHANCELLOR [ELDON].—This question is now presented to me in quite a new point of view. Upon the former occasion it was argued, as if the immediate right of action against Thomas Boulton, the principal debtor, was gone. It is clear that, if he might have been forthwith sued, and execution had against him, as the fruit of that suit, the surety is not injured; and on the other hand, that, in general, if time is given to the principal, the surety is discharged. The objection to the reserve of remedy against the surety consists in the interest the principal has; that the surety shall not be applied to. It is said, that the principal cannot by contract deprive himself of the benefit, derived from that forbearance; and there certainly have been decisions, that, if time is given to the principal, reserving the right to go against the surety, the principal cannot raise the objection upon his right to time as against the surety; as there is the contract of the principal, arising out of the contract for reserve against the surety, that the latter, if the creditor goes against him, shall not be deprived of the benefit of the contract as against the principal. That was *Burke's Case*; as to which I will look at the note I have. If the contract for reserve against the surety prevents his remedy against the principal, that contract for reserve will not do: but the question is, whether it does in law deprive the surety of that benefit. It may in many cases be a very rational provision, that the principal shall have time, provided he can *have it without prejudice to the benefit of the remedy [* 27] against the security; which, though worth nothing at present, may in a year's time be very valuable; and the creditor may very reasonably mean to secure the the benefit of that contingency.

1811, April 11th. The Lord CHANCELLOR granted the Injunction.

1. THE bankruptcy of the acceptor of a bill of exchange does not dispense with the necessity that the holder should give notice to the drawer; but, where the drawer has no effects in the hands of the drawees, nor any right upon any other ground to expect that the bill would be paid, he is not entitled to notice of its dishonor; knowledge being, in such a case, substituted for notice: see, *ante*, note 3 to *Mawson v. Stock*, 6 V. 300.

2. A release to a principal debtor, without special reservations, is a release to the sureties for the debt: see note 2 to *Rees v. Berrington*, 2 V. 540. And where a person liable for the debt of a bankrupt discharges the demand, he may prove under the commission, if the original creditors have not done so; or, if they have, he will be entitled to the benefit of the proof made by them: see note 2 to *Ex parte Matthews*, 6 V. 285.

DASHWOOD v. PEYTON.

[1811, APRIL 1, 2; MAY 2, 3, 6, 10.]

No devise by implication from the mere recital of an erroneous conception of right.

As to an implied Election, the Will imposing an express Election in favor of another person, *Quære*.

As to the validity of a bond of resignation of a Living in favor of a particular person, and not to accept a Bishopric (the latter not directed by the Will), and whether to be considered upon the principal of marriage brokerage bonds, as against a public policy, or as a corrupt transaction, with reference to which the Court would not act, *Quære*.

General bond of resignation of a Living bad, [p. 37.]

Devise to B. after the death of A., [p. 40.]

B. being the heir at law, a necessary implication for A. for life, [p. 40.]

Precatory words held imperative, where the object and subject are certain (a), [p. 41.]

Devise by raising a case of Election, expressly or by clear implication (b), [p. 41.]

Devise to the heir after the death of the devisor's wife: a necessary implication, that the wife shall take for life: but no implication for her upon such a devise of another man's estate through the medium of Election, [p. 48.]

Principle of Election; giving a right, not to the thing itself, but to compensation out of something else, [p. 49.]

SIR THOMAS PEYTON by his Will, dated the 14th of January, 1765, devised real estates, and also the advowson of Doddington, to the use of his nephew Henry Dashwood, afterwards Sir Henry Peyton, for life, with remainder to his first and other sons in tail male, to the Plaintiff James Dashwood and his first and other sons and several remainders over, with the following direction:

"I do hereby order, will and direct, if the living of Doddington in the Isle of Ely in the said county of Cambridge shall happen to become vacant by the death or resignation of the present incumbent or otherwise while my said nephew Henry Dashwood shall be [* 28] in *possession of the estates hereinbefore by me given or limited to him as aforesaid, then and in such case he the said Henry Dashwood shall and do present his said brother James Dashwood to the said living and rectory of Doddington."

At the death of Sir Thomas Peyton the living of Doddington was full: Dr. Proby, afterwards Dean of Litchfield, being the incumbent. Sir Henry Peyton, being seised for his life of the devised estates and the advowson, and being also seised of the other estates in the county of Suffolk, which he had power to dispose of, by his Will, dated the 10th of January, 1789, reciting, that he was seised or entitled for life under the Will of his uncle Sir Thomas Peyton among other estates of or to the advowson of the rectory of Doddington, with remainder to his eldest son Henry in tail male, with divers remainders

(a) As to trusts created by words of desire, request, recommendation, &c. in a will, see 2 Story, Eq. Jur. § 1068-1071; *ante*, note (b) *Bull v. Vardy*, 1 V. 270; *Peirson v. Garnet*, 2 Bro. C. C. (Am. ed. 1844,) 47, note (a).

(b) As to the doctrine of election, see *ante*, note (a) *Butricke v. Broadhurst*, 1 V. 171; note (a) *Baugh v. Read*, 1 V. 257; note (a) *Blake v. Bunbury*, 1 V. 514.

over, "subject to a direction in said Will, that my said brother James Dashwood should be presented to said rectory, when it shall next become vacant, which it is my wish may be complied with, now I do hereby declare it to be my desire and earnest wish, that in case upon the vacancy of the said living by the death or promotion or resignation or other act of the present incumbent the said James Dashwood shall not be then living, or shall decline to accept of the said presentation, or in case the said rectory shall again become vacant after the said James Dashwood shall have been presented to and accepted said presentation, then and in either of such events my said son Algernon Peyton may be presented to said rectory or living of Doddington as soon as he shall be qualified and willing to * accept of said presentation; and that in order thereto [* 29] in case at any time after such vacancy as is last hereinbefore mentioned and before my said son Algernon shall be qualified and willing to accept of said presentation the said rectory shall become vacant, such fit person or persons successively, giving a preference therein to my nephews according to their seniorities, shall be presented to said rectory upon his or their executing a bond in a sufficient penalty for resignation of said rectory upon the event of my said son Algernon being qualified and expressing a desire to accept of said Living."

The testator then gave and devised all his freehold and copyhold estates in the county of Suffolk to his wife for life; and after her decease to Sir John Rous and John Heigham, and their heirs, upon trust, that, in case the testator's son Henry Peyton shall as soon as conveniently may be after his attaining the age of twenty-one years secure to or in trust for the the testator's son Algernon Peyton the presentation of the said rectory or living "according to my wish and desire hereinbefore by this my Will expressed," then his said trustees should convey the said estates "unto my said eldest son Henry, his heirs and assigns for ever: but if my said son shall refuse or neglect to secure said presentation to my said son Algernon by the space of twelve calendar months next after he shall attain the age of twenty-one years, and be thereunto required by the said Sir John Rous and John Heigham or the survivor of them or his heirs, and shall wilfully neglect to do any act, by which neglect the said Algernon Peyton shall be prevented from being presented to said rectory or living, or if my said son Henry shall die without having so secured said presentation," then upon trust to convey the said estates to Algernon Peyton, his heirs and assigns for ever, on his attaining the age of twenty-one years.

By a codicil, dated the 17th of January, 1789, with a * similar recital, and that he had by his Will declared his [* 30] desire and earnest wish, &c. (as stated in the Will with reference to the living) the testator declared, that, being desirous of expressing clearly and fully his will and desire with regard to said preference to his said nephews according to their seniority, he desired "that in case of the last-mentioned vacancy before my said son Al-

gernon shall be qualified to accept of said presentation as aforesaid, my nephew John Heigham shall be first offered said presentation to said rectory or living; and in case of his death or of his refusal or neglect by the space of twenty-one days to execute such bond of resignation as aforesaid, then and in such case my nephew Henry Heigham may be then offered said presentation;" and in case of his death or refusal or neglect for the space of twenty-one days, "my nephew George Heigham;" and in case of his death "or of his refusal or neglect by the like space of twenty-one days to execute such bond of resignation as aforesaid, then that some other fit person or persons may be successively offered said presentation in the mean time and until my said son Algernon shall be qualified and willing to accept said presentation: every such person previously to his being presented to said living executing such bond of resignation as aforesaid; and I do hereby declare it to be my will and direct, that such bond of resignation as aforesaid, shall be in trust for and for the sole use and benefit of my said son Algernon Peyton."

Sir Henry Peyton died in March, 1789; leaving his two sons Henry and Algernon surviving. Sir Henry Peyton, the eldest son, having attained twenty-one, by indenture, dated the 15th of December, 1802, demised and granted the advowson to Lord Rous, his executors, &c. for the term of ninety-nine years, if Algernon [* 31] * Peyton should so long live, for the purpose of enabling them to present Algernon Peyton to the living; and to entitle Sir Henry Peyton to a conveyance of the estates in the county of Suffolk; and Lord Rous conveyed the Suffolk estates to the use of Sir Henry Peyton and his heirs.

Dr. Proby continued the Incumbent until his death in January, 1807; having been the rector fifty-seven years. Algernon Peyton was then of the age of twenty-one years. By a letter to the Plaintiff James Dashwood, dated the 23d of January, 1807, Lord Rous, the trustee, stated, that Sir Henry Peyton was anxious to comply with his father's Will; and at the same time to guard against a forfeiture of the Suffolk estate to his brother Algernon; to which Sir Henry was liable, if he did not within twelve months after he came of age secure to Algernon the presentation as soon as he should be capable of holding it; that a deed of trust had been prepared accordingly; vesting the living in Lord Rous, as trustee, to present Algernon; if the Dean had lived, until Algernon attained twenty-four; and in case of the earlier death of the Incumbent to give the refusal of it to the Plaintiff; to hold under a bond of resignation and an agreement not to accept a Bishopric, until Algernon should be capable of taking it; if the Plaintiff should decline for twenty-one days to accept it upon those terms, then to be offered to Mr. Heigham; and in case of his refusal for twenty-one days some other fit person to be found, to hold it; and recommending the Plaintiff to take it.

The Bill stated, that at the time of receiving the letter from Lord Rous the Plaintiff was ignorant of the contents of the Wills of Sir

Thomas and Sir Henry Peyton; or that it was competent to Sir Henry Peyton, the son, or the trustees, to have secured the next presentation to the Plaintiff for his life in preference to Algernon Peyton without requiring any bond, obliging the Plaintiff to resign in favor of Algernon Peyton on his becoming qualified to hold the living; and the Plaintiff under such ignorance and in reliance on the representations, so made to him by Lord Rous, expressed his willingness to accept the presentation on the terms proposed. Accordingly a bond was executed in February, 1807, by the Plaintiff; reciting the demise of the advowson in 1802 by Sir Henry Peyton to Lord Rous for ninety-nine years, and the vacancy, &c.; with condition, that, if James Dashwood shall not after his admission, institution, &c., upon the presentation of Lord Rous accept a Bishopric, and also, if, when Algernon Peyton shall be in holy orders, and duly qualified and willing to be presented, &c. James Dashwood shall within one month after request resign, or if Algernon Peyton shall die without being qualified and willing, &c., the bond shall be void.

The Bill farther stated, that the Plaintiff, who was soon afterwards presented, under the same mistake wrote to the Bishop; intimating his intention to resign conformably to this bond; and afterwards discovered, that it was intended by both testators, that he should be presented without any such obligation; and the Bill prayed, that the Defendant Lord Rous may be decreed to deliver up the bond to be cancelled, and an injunction against proceeding upon it.

The Answers, admitting the facts, submitted, that it was incumbent upon Sir Henry Peyton, in order to entitle himself to a conveyance of the Suffolk estate, to demise the rectory so that the Plaintiff, if he accepted the presentation, should be under an obligation to resign, according to the condition of the bond; that by Sir Henry Peyton's Will the Defendant Sir Henry Peyton was not authorized to demise the rectory in trust to present * the Plaintiff; and upon his death Algernon Peyton, if qualified; and, if not, some other person, who should give a bond, &c.; that though it is not expressly required by the Will or Codicil of Sir Henry Peyton, that any bond should be required from the Plaintiff, yet under the circumstances it was proper and necessary: the Plaintiff being entitled to the presentation in the event only of Dr. Proby's death in the life of the testator Sir Henry Peyton, or while he was in possession of the estates, devised to him; that it was not his intention, that the Plaintiff should be presented without any restraint, &c., or except in the event of a vacancy in the life of Sir Henry Peyton, the testator, or while he was in possession of the estates, devised to him by Sir Thomas Peyton. [* 33]

Sir *Samuel Romilly*, Mr. *Hollist*, Mr. *Hart*, and Mr. *Roupell*, in support of the Motion for an Injunction.—This relief is sought upon two grounds: first, that the Plaintiff, when he gave this bond, was not aware of his right: secondly, that the bond is against public policy.

In the only two cases which have occurred since *The Bishop of*

London v. Fytche (1), the final decision of which in the House of Lords was against the validity of a general bond of resignation, the Court of King's Bench has certainly shown a strong inclination not to extend that; and to admit distinctions: but there is much more objection to this bond; which includes farther an obligation not to accept a Bishopric; in effect an undertaking to pay a sum of money, when the obligor shall be promoted to a See: an attempt [* 34] by * thus defeating the King's right to appoint to the benefice, vacated by that promotion, to impose restraint upon the exercise of that branch of the Prerogative, by which his Majesty controls the appointment to that important trust; involving duties, the proper discharge of which is of the most essential importance to the public. Upon these grounds a Court of Equity will not permit this bond to have effect; if it could be enforced at Law; and upon such subjects, though there might be a defence at Law, there is a concurrent jurisdiction: *Hanington v. Du Chatel* (2).

The Plaintiff takes under the Will by implication, as in the cases of *Roe, on the Demise of Randle v. Summerset* (3), *Bibin v. Walker* (4), and *Poulson v. Wellington* (5). In the last a mere recital of the consequence, if no appointment should be made, was held a sufficient indication of the intention to give the subject. There is no direction, that a bond shall be taken from the Plaintiff. That is confined to the Heighams, or the other person, to be presented in the interval. The Plaintiff, entitled to be presented, free from any obligation, was induced to give the bond under a direct misrepresentation by the letter of the trustee, that there was no alternative; that they were bound to require a bond, not only for resignation, but also not to accept a Bishopric. With this clear implication the Will of Sir Henry Peyton imposes a case of election on his eldest son by a forfeiture of the devised estates, if he should not secure the presentation of Algernon Peyton to the Living; and by taking the Suffolk estate the eldest son made his election; and must comply with all the terms.

[* 35] * Sir Arthur Piggott, Mr. Richards, and Mr. Johnson, for the Defendants.—The Plaintiff has no claim under the Will of Sir Thomas Peyton: the event described by that Will not having happened. Upon the Will of Sir Henry Peyton it is impossible to raise a case of election, or by any fair construction to say, that the testator has given the first presentation of this Living to the Plaintiff. Upon the form of the trust, as it appears in the Will and Codicil, it is consistent to suppose, that the testator acted under a false impression, that his uncle had put the presentation out of his control; and, supposing the Plaintiff thus provided for, he proceeds

(1) 1 Bro. C. C. 96. In the House of Lords, May 30th, 1783. Cunningham's Law of Simony: *Bagshaw v. Bosley, Partridge v. Whiston*, 4 Term Rep. 78, 359.

(2) 1 Bro. C. C. 124.

(3) 2 Black. 692; 5 Bur. 2608.

(4) Amb. 661.

(5) 2 P. Will. 533.

to his own objects. Who can say, that, independent of that mistake his intention was to give this Living to his brother? No such intention is to be collected from the Will: and a Court of Justice cannot venture thus to make a Will for him; by implication merely from that mistake inferring an intention to give; raising a case of Election.

Sir *Samuel Romilly*, in reply.—There is no such distinction, that there may not be a devise by implication, when it is to be made effectual upon the doctrine of Election, farther than that the presumption is against the intention to dispose of the property of another: but, if a necessary implication appears in a Will to operate upon property, which is not the testator's, the effect through the medium of election is the same as a disposition of his own property. The doctrine of Election is no more than this: if the Court sees clearly the intention to dispose of the property of another, to whom something is given by the Will, he must, if he will take the bounty, comply with the *condition by giving up his own [* 36] property (1). The question is merely upon the intention: did the party mean to dispose of the property, which was not his? If that intention appears by necessary implication, the effect is the same as if expressed in terms. In this Will such intention appears very clear, by the means adopted for securing the presentation of *Algernon*, providing indirectly for that of the Plaintiff also. Seeing that intention so to dispose of this property the Court must have recourse to the general principle, on which the doctrine of Election stands; and the effect is exactly the same as if this was property, over which the testator had complete dominion.

The Lord CHANCELLOR [ELDON].—This Motion is made under very particular circumstances; and though I should have wished, before I decided, to look into the authorities upon the doctrine as to the effect of recital, founded in mistake, with or without words denoting wish, yet with reference to the nature of the property I think it better not to delay the determination.

Independent of the circumstances, arising out of the Will, this is the case of a presentation of a person, who upon that presentation has given a bond of resignation in favor of a particular individual and a bond never to accept a Bishopric; and, supposing the case had brought forward more distinctly the objection, the ground of it is to be considered in different views.

In the case of *The Bishop of London v. Fytche* (2), * the house of Lords held, that a general bond of resignation is bad. That case was not followed in the Court of King's Bench with reference to a bond to resign in favor of a particular individual, the son or nephew of the person, to whom that obligation was made. In that case it was said to have been repeatedly decided at law, that a general bond of resignation is good; but

(1) See *ante*, *Thellusson v. Woodford*, vol. xiii. 209, and the references in the notes, vol. i. 523, 7.

(2) 1 Bro. C. C. 96; *Cunningham's Law of Simony*.

I believe it will be found, that the Lord Chancellor, or that Judge, who against the opinion of the other Judges held a general bond of resignation to be positively bad, denied, that such bond had been held good in any instance; and stated, that a search would produce that result. It is very difficult also upon the pleadings in *The Bishop of London v. Fytche* (1) to reconcile the distinction between general and particular bonds of resignation with the principle, on which the House of Lords made that decision. It would not however become me, having regard to what is the present state of the law on this subject, to interpose in a Court of Equity on the ground, that this is a particular bond of resignation; as, though I agree, that this Court, if it has a concurrent jurisdiction, is not bound to wait for the decision of a Court of Law, yet reasonable caution requires a Court of Equity not hastily to pronounce bad a bond, understood to be good at law; and it would at least be proper to leave that question to be considered at law.

I make this observation with another view. If the particular bond is bad, it is so either from motives of public policy, or as being understood to be bad either by Statute or the Common Law. Admitting the cases of relief, afforded to a *Particeps Criminis*, there is considerable doubt, upon grounds of public policy, whether it is possible for a clergyman to come here, stating that he
 [* 38] had given * a general, or particular bond of resignation, and on the ground, that such bond was bad, calling on the Court to enable him to hold the Living, discharged of the obligation under the bond. In the case of the *Bishop of London v. Fytche* the Living and the bond went together: the clergyman lost his Living; and his bond was held good for nothing: in other cases the ground of relief was, that a bad and vicious use was made of the bond: but I doubt, whether this is a proper ground of relief; and with regard to the other ground of public policy, the engagement not to accept a Bishopric, that, if a ground in equity, is equally so at law. I admit the concurrent jurisdiction: but, knowing, that there are in fact many such bonds, I should wish to receive information as to the law on that head, before I set aside this bond in equity on that ground; being extremely unwilling to interpose against that, which in habit and practice, it is notorious, very constantly takes place.

Supposing the Court cannot interpose on either of those grounds, another ground is taken by the Plaintiff; not disputing the legality of the particular bond, and his engagement not to accept a Bishopric, he insists upon his right to have this Living, as an interest by devise, standing upon implication, or the doctrine of Election, given to him purely and without condition; that terms are imposed on him, which ought not to be imposed; that the nature of the transaction was not dealing, treaty, and bargain; but it is a transaction, in which

(1) 1 Bro. C. C. 96; Cunningham's Law of Simony; ante, vol. viii. 61, *Lord Kircudbright v. Lady Kircudbright*; *Rowlatt v. Rowlatt*, 1 Jac. & Walk. 280, and the references in the note, 283.

to a man, having the right, though not aware of it, this presentation was held out as a favor; and with that conception, that there was no right, or demand, under that common mistake, the presentation was clogged with a condition, obliging him to give up the Living; whereas he ought to have it, as all benefices are by the policy of the law held, * by a tenure for life. Both parties, the person presenting, and he, who was presented, had, I believe upon the whole, a very honorable purpose; and I see it in no other view than that these conditions should not be operative, if James Dashwood had a right to be presented. [*39]

The question then is, whether he had that right; depending upon a very singular state of circumstances. Upon the first of these Wills it is impossible to contend, that James had any right to the presentation; unless the vacancy occurred during the life of Henry; and while he was in possession of the devised estates. Upon the Will of Sir Henry, and the codicil, it is clear, that the tenant in tail of the advowson of Doddington had made a conveyance of it, amounting to this; that the trustees should upon a vacancy present James Dashwood, if he thought proper to accept it; and upon his death should present Algernon, if he was twenty-four years of age; or, if not, that they should present the Heighams successively in their order; and it appears to me, that they could not have complained of the trust, interposed in favor of James Dashwood: nor could Algernon Peyton have complained of it.

The circumstance, that a condition is expressed with reference to one individual and not the other, is not sufficient proof, that there was no intention to raise a case of Election; and, if a case of Election is raised by the operation of this Will, notwithstanding the express condition as to the Suffolk estate, yet, if any other property was given to Henry, upon which Election can be fastened, the Court will apply it without any express direction, and though there is an express direction with regard to another individual: a circumstance, however, which will make the Court consider, whether the true * construction is not, that the testator expressly imposed a condition on one, conceiving it to be a gift to him; and did not impose a condition on the other as understanding, not that he took a gift, but that he was already in possession by some antecedent title. [*40]

It was contended justly, that James Dashwood must succeed by some title, legal or equitable, in himself; and my opinion is, that Algernon could not have come here, while under the age of twenty-four; insisting upon his brother Henry's making any conveyance to exclude James Dashwood. Henry might have said, it was immaterial to him, whether the testator expressed himself by mistake; but the conveyance to Algernon of the Living, after James had possessed it, would satisfy the terms of the Will. So the Heighams, who might, I think, have claimed free from this condition as to the Bishopric, could not have called on Henry for the presentation, until James had refused, or a vacancy occurred after his possession.

The true question is, whether, if Henry chose to satisfy the claims of those persons, passing over James Dashwood, he had an interest that would in equity support his claim to be relieved against that Act. That cannot be upon the ground of a devise by implication; which strictly arises, where the deviser meaning to part with his interest, parts expressly with a portion of it only; and the question is, whether that, which is not in terms given, is by the effect of the Will, taken altogether, disposed of. Where, for instance, an estate is given to B. after the death of A. the question is, what is done with it, or whether any thing is meant to be done with it, during A.'s life. If B. is the heir at law, of necessity A. must take the intermediate interest; though not disposed of; as the heir at law

cannot take during the life of A. So, as to precatory [*41] words; *which in Equity have been held imperative, where the object and subject are certain (1): those are cases of trust, raised either out of the disposition of an interest, or out of what amounts to a direction to elect. Where for instance, personal property is given to a person for ever; with words of request to that person to give upon his death definite, ascertained, parts to definite, ascertained, objects, a trust arises; as it is declared, what is to be given; and to whom; which however may be considered rather a strong decision. So, if personal or real estate is given to A.; with an expression of hope and trust, that he will give at his death property of his own to B. that is an imperative trust upon express condition.

The real question is, whether this is to be considered as a case of Election; and though it cannot be a direct devise, as the testator had nothing to give, it is clear, that an effectual gift may be made by raising a case of Election: but for that purpose a clear intention to give that, which is not his property, is always required. If therefore it can be established, that the testator has expressly declared, or has shown a clear intention, that James Dashwood should take this presentation, a case of Election would be raised: but if upon the whole Will, taken together, it is obvious, that the testator thought he had nothing to give to James, that he was already entitled, and the testator under that supposition has not given to him or expressed an intention, that he should take, I find no authority for holding mere recital, without more, to amount to gift, or demonstration of an intention to give.

Upon the whole of this case, admitting, that, if there was either direct gift, or, what amounts to it, intention to give what was not the testator's property, the condition, expressed as to Alger- [*42] non, *would not preclude the application of the same doctrine of Election as to James Dashwood, yet the expression of that condition shows an anxiety to secure what he intended to give; accounting for the absence of it as to that, which he did not conceive was his to give; and upon the whole will, though, I

(1) *Ante*, Bull v. Vardy, vol. i. 270, and the note, 272.

think, Algernon might have insisted under the age of twenty-four, that he should not be disappointed by giving this Living to any other person than James Dashwood, that was a question between Algernon and Henry, the Heighams and Henry, and the Heighams and Algernon ; and by mistake James Dashwood has not derived such an interest in the property, that he could insist upon. The question, whether it was lawful to clog the presentation to him with these conditions, I shall not deal with in this Court.

As this Motion will probably have the effect of a hearing, you may, if you think proper, bring under the review of the Court the Order for dissolving the Injunction.

The Motion was again argued ; and after the argument the Lord Chancellor mentioned the case of *Tilly v. Tilly* from Mr. Joddrell's notes ; where, the owner in fee of a trust estate, reciting, that his wife was entitled to dower out of that estate, devised it ; and that recital was held to amount to a devise to her of a third part of the rents and profits.

May 10th. The Lord CHANCELLOR [ELDON].—I am indebted to Mr. Hollist's industry and kindness for a very correct note * of the case of *Tilly v. Tilly* (1) : an important [* 43] authority ; and the only one, that seems to have much relation to this subject ; and I have in Mr. Joddrell's note book what the Lord Chancellor is reported to have said ; which I take to be copied from Mr. Forester.

Lancelot Tolson Tilly was entitled in the event of attaining the age of twenty-three to a conveyance of real estates in fee-simple ; which in the event of his death under that age were devised to the Defendant Simpson, and his heirs. Tilly in 1733 at the age of eighteen married the Plaintiff. Supposing that she would be entitled to dower, in case he should live to attain twenty-three, which would be correct, if the trustees had made the conveyance, he by his Will made a provision for her in the alternative of his death under twenty-three : the case, in which she would not have been entitled to dower. When he re-published his Will, he was above the age of twenty-three. The Will was therefore to be considered as speaking, after he had become entitled to a conveyance : entitled therefore to call for the legal estate ; but not having it : his wife therefore not entitled to dower : but it appeared upon the Will, that he conceived her to be entitled. The question therefore was, whether those, who were to take under his Will, could contest with her the propriety of that conception. The Court was struck with the hardship ; and it is perhaps rather difficult to reconcile what the Lord Chancellor said with sound principle.

The note states, that the Lord Chancellor declared it was a very hard case upon the Plaintiff ; that the Court had gone a great way

(1) Register's Book, fol. 577, July 13th, 1743.

in considering declarations of intent by recital as devise: therefore, as the daughter was an infant, he would without making any precedent decree a third of the rents to the Plaintiff; and leave the infant to show cause, when of age.

With all deference to that great Judge I must say, that is not the way, in which the Court should express its opinion: the authority is weakened by such expressions; and it was difficult to make the Decree, that appears to have been made, without more hazard of forming a precedent than the Lord Chancellor seems to apprehend. It is obvious however, that though the Court had a strong inclination, that the widow should have this provision, (and a case of greater hardship could not be presented) his Lordship does not seem to hold out his decision as a very high authority. The Decree certainly declares, that it appeared to have been the opinion and intention of the Plaintiff's husband by the expressions of his Will, that she should have her dower of such part of the trust estates, to which he would have been entitled in fee, in case he lived to the age of twenty-three; and that the Defendants ought not to be permitted to take the benefit of the devises and bequests to them and at the same time frustrate the testator's intention with regard to dower; an account was decreed accordingly; a day being given, as it must of necessity, to the infant to show cause. As against the infant therefore this Decree cannot be considered as establishing a case of Election upon the declaration of intention by recital in the Will: and the person, entitled next in remainder, who was adult, appears to have submitted. This is a correct account of the case of *Tilly v. Tilly*.

There was in this case considerable controversy upon the point, whether James Dashwood did, or did not, know the effect of Sir Thomas Peyton's Will; and as clearly Henry Peyton, [*45] *the tenant for life, was not acquainted with it, I may fairly presume James Dashwood's ignorance; and that there might be a common mistake. After the death of Sir Henry Peyton, upon whose Will this question arises, the present Sir Henry Peyton became entitled as tenant in tail of the manor and right of presentation, and unquestionably under no legal title to present James Dashwood: but Sir Henry, the testator, having a conception, that James Dashwood had some interest, and being determined to give an interest to his younger son Algernon, made provision by his Will with regard to the Suffolk estate; which led to the advice, taken as to the act to be done, to secure to Sir Henry Peyton the benefit of the Suffolk estate; securing also the presentation to Algernon; and the result was an opinion, upon consideration of both Wills, that Sir Henry Peyton was under no obligation to present James Dashwood; that, whatever act might be necessary with regard to Algernon, to make good Sir Henry Peyton's title to the Suffolk estate, James Dashwood had no right to call upon him to do any thing; and upon the deed his determination is clear to give the living to James Dashwood, as matter, not of right, but of favor; on account of their connection; and with the farther view of securing to

himself the Suffolk estate by securing to Algernon the Living, when, having attained the age of twenty-four, he should be capable of taking it. Sir Henry Peyton therefore, executing the demise in trust to present James Dashwood, cannot be represented as having made an election to take under the Will of Sir Thomas Peyton; and if the Will of the late Sir Henry Peyton raised a case of Election, and the construction put upon that Will is right, an instrument that does not execute the intention, attributed to that Will, cannot be considered an election to take under *it. The Elec- [* 46] tion therefore, if there is a case for it, is still open.

From the correspondence Lord Rous appears to have conceived, that by the terms of these Wills James Dashwood, if presented, must give a bond of resignation; and I will presume, that he took the presentation under a belief on his part (to state it as high as I can), that he was to give a bond. The mistake was not unnatural; and I do not believe, he had a notion at the time, that he had a right. If he had, there is enough of mistake and surprise to afford a ground for relief: but there is no reason to conclude, that Sir Henry Peyton meant to give him a right: on the contrary Sir Henry Peyton acted on the supposition, that there was no such right.

Under these circumstances the question naturally arose as to the effect of a bond of resignation, general, or in favor of a particular person; and I do not see, how I could possibly interpose to relieve merely on the ground, that such a bond was given. Whether he understood, or fancied, that he had the right without giving a bond, or not, he has given it; and two principles oppose his claim to be relieved against it. If, as the Court of King's Bench held, a bond to resign in favor of a particular person, is good, as not being precisely the same as that, which in the case of *The Bishop of London v. Fytche* (1) was held bad in the House of Lords, on that ground there can be no relief against it; if it falls within the principle, on which the bond was in that case determined to be bad, the Plaintiff claims relief against an act, with reference to which this Court would not stir: not, as in the case of marriage-brochage, bad upon grounds of policy, and therefore admitting relief; but *bad, [* 47] as being a corrupt transaction: the party therefore not coming with clean hands, entitling him to relief. Upon that question I give no opinion; as, if it is to be decided, the opinion of a Court of Law must be had upon it; and therefore there is no reason to grant an Injunction against an action on the bond.

This Bill however does not state that case; contending that the Plaintiff under the Will of Sir Thomas Peyton has no title; nor any legal title under that of Sir Henry Peyton; but that he has under the latter Will an equitable title; (and, as I must suppose him to say, to this presentation); a case of election being very different from a title to the thing itself. Having this equitable title to the presentation under the effect of the whole transaction, in the course

(1) 1 Bro. C. C. 96; Cunningham's Law of Simony.

of which this bond was given, he proposes a case of surprise in this respect ; that the parties intended to give him that, to which they understood him to be entitled : a presentation according to his right ; that he proposed so to accept ; that they have not given, and he has not accepted, a presentation according to his right ; that all were involved in one common mistake ; and the Court must regard the presentation as made according to his right : viz. subject to no condition of resignation ; that it is therefore against conscience to sue upon the bond at Law ; and consequently the Injunction should be granted.

The proposition, that the presentation was made under a common mistake, requires the Plaintiff to establish, that Sir Henry Peyton meant to give some title, which he had under the Will of the late Sir Henry ; which it is impossible to make out. The present Sir Henry's view of it was, that he did not, whatever wish he might have had in James Dashwood's favor, conceive him to be entitled to the presentation.

[* 48] * The Plaintiff must then take it in another point of view ; and contend, that he is entitled to the presentation, free from all condition, upon the legal and equitable effect of the two Wills, taken together ; and therefore he had the title, subject to no condition, that could be enforced by suit ; whether intended by Sir Henry, or not ; and the effect of their mistake is, that the Plaintiff has a right to the Living, discharged from the bond. In all the cases stated of devises by implication, the party, upon whose Will the question arose, had the estate to give by the effect of his own Will. That certainly makes some difference. A devise to the heir at law of the devisor after the death of his wife raises a necessary implication, that the wife shall take for her life ; as the estate must go to some one in the interval : but from the devise by one man of another man's estate after the death of the devisor's wife there is no implication in her favor. Admitting however, that upon a similar construction of the Will, as furnishing implication, a case of Election may be raised, the question is, whether Sir Henry did mean to raise that case ; and, if he did, whether the consequence, taking the whole Will together, is, that the Plaintiff can insist upon having this Living ; or must be satisfied in Equity by the benefit, which results from the application of the doctrine of Election ; and with regard to both these considerations this Will appears extremely peculiar. The expression of his intention as to the Living in favor of Algernon, whose title to take it he seems to think depending entirely upon his expression of intention, is by the alternative as to the Suffolk estate : " if you give the Living to Algernon, you shall have the Suffolk estate : if not, he shall have it." Conceiving, that the Plaintiff was entitled to this Living, not in consequence of his (the testator's) expression of intention, he does not by conditional expressions seek to enforce compliance with the Will of another person.

[* 49] * With regard to the doctrine of Election, Algernon, if

the vacancy had happened, when he was twenty-one, might have desired to have his uncle James presented without a bond, in preference to any one else with one; and there is nothing in the Will, obliging any one to give a bond not to accept a Bishopric. As far as the doctrine of Election is to be enforced as to the Suffolk estate, if Algernon did not complain, the Plaintiff could not: he cannot, I think, work out a case of Election by the Suffolk estate: and I strongly incline to the opinion, that he cannot by another estate, which the Defendant takes in fee, raise a case of Election, though not in terms expressed, by implication upon the general doctrine of the Court. That however is the utmost he could do; and where a case of election is raised, it does not give a right to retain the thing itself; though it may give a right to compensation out of something else.

The conclusion is, that I cannot grant an Injunction; but the refusal of it is altogether without prejudice to any question upon the case of Election: if the Plaintiff chooses to carry on the suit (1).

1. In the case of *Lord Kircudbright v. Lady Kircudbright*, 8 Ves. 61, the Lord Chancellor observed, that the question as to the legality of resignation-bonds would never have perplexed him, if there had not been so many authorities; and it may be easily collected, that his Lordship's perplexity was occasioned, not by the cases which have established that general bonds of resignation are bad, but from those other cases, in which it has been subsequently held, that a bond for resignation of an ecclesiastical benefice, in favor of a particular individual, is good. And he again observed, in *Rowlatt v. Rowlatt*, 1 Jac. & Walk. 283, it would be very difficult to say what was the principle upon which that distinction was taken. The late case of *Lord Sondes v. Fletcher*, in Dom. Proc. (reported in 3 Bingham 502,) has determined that all bonds of resignation are illegal.

2. Where a Court of Equity has jurisdiction in respect of the main subject of suit, it may undoubtedly decide upon matters of fact, or legal questions arising incidentally, without referring such questions to a jury: see, *ante*, note 1 to *The Canons of St. Paul's v. Crickell*, 2 V. 563. And the Court of Chancery is not bound to act upon an answer given by a Court of law, to which a case has been directed (see note 3 to *Trent v. Hanning*, 10 V. 495); though the opinion of such a Court, upon a legal question, must of course be entitled to high respect, and appears to have been formerly treated as quite conclusive by some of the holders of the Great Seal, whether it accorded with their own opinions or not: see note 8 to *Underhill v. Horwood*, 10 V. 209.

3. Relief may be given in certain cases to a *particeps criminis*; but then such relief will always be in aid, not in subversion of public policy; the Court interferes for the sake, not of the party, but of the public: *Lord St. John v. Lady St. John*, 11 Ves. 536; and see note 2 to *Ainslie v. Medlycott*, 9 V. 13, with note 4 to *Hatch v. Hatch*, 9 V. 292.

4. A devise to one who is not the testator's heir at law, after the death of the testator's wife, can never give a life estate by implication to the wife, and the heir will be in by descent so long as she lives; but, where the devise is to the heir at law, after the death of the wife, this affords a plain and necessary implication, that the wife is to take for life, (see note 2 to *Holmes v. Cradock*, 3 V. 317); otherwise the estate would remain *hereditas vacans*, for no one else could take it, the heir being expressly excluded until the death of the wife: *Willis v. Lucas*, 1 P. Wms. 474; *Horton v. Horton*, Cro. Jac. 75; *Gardner v. Sheldon*, Vaugh. 263;

(1) With reference to the question of implication this is termed a strong case by Sir William Grant, Master of the Rolls, 1 Mer. 651, 2; *Sandford v. Raikes*. Upon the general doctrine of Election and the particular question, whether the effect is Compensation or Forfeiture, see the notes, *ante*, vol. i. 523, 7.

Upton v. Lord Ferrers, 5 Ves. 806. But, where a testator, who in the early part of his will has devised lands in several towns or parishes to his wife for her jointure, by a subsequent clause devises all his lands, tenements, and hereditaments, in those towns and parishes, after the death of his wife, to his heir at law, or his co-heiresses, there, if he has other lands in the said parishes, besides those expressly devised to his wife, the will is to be taken distributively; and, though the heir can only take an expectant remainder in the lands so devised for life to the testator's wife, the other lands will pass to him immediately: *Sympton v. Hornsby*, Prec. in Cha. 440, 452; *Cook v. Gerrard*, 1 Saund. 186, a. So, where a person has conveyed an estate to uses for a term of years, and declared the trust of the term to be, that A. B. should receive the rents and profits of the estate for so many years of the term as he shall live, with a promise that, if the conveying party, his executors, or administrators, shall pay the said A. B. a certain named sum, then the term is to cease and be void; should the party who has executed such a conveyance in trust make a will, and thereby devise to the *cestui que trust*, the sum upon payment of which it was stipulated the term should cease; and, by another clause of the said will, devise the estate in question to his own heir at law, after the death of the *cestui que trust*; the construction will be (not that the *cestui que trust* shall take an absolute and indefeasible estate for life by implication, but) that this clause means only to continue the trust estate for life as a security for a stipulated sum, until that shall be paid, without giving the *cestui que trust* any other estate than what he had before by the term, which estate must continue redeemable: *Boutell v. Mohun*, Prec. in Cha. 384. The ground upon which the three last-cited cases were decided was, that an heir at law is never to be disinherited by implication, unless that implication is a necessary one: see note 6 to *Pickering v. Lord Stamford*, 2 V. 272.

5. Words of request or recommendation, in a will, have, generally at least, the force of an imperative direction, and raise a trust: see note 2 to *Bull v. Vardy*, 1 V. 270, and note 4 to *Moggridge v. Thackwell*, 1 V. 464; but this general rule admits some qualification, as to which, see note 2 to *Pigot v. Bullock*, 1 V. 479.

6. As to the doctrine of election, the principle upon which it is founded, and the admissibility of evidence to raise a case of election, when the intention is ambiguous on the face of the instrument under which the question arises, see note 3 to *Blake v. Bunbury*, 1 V. 194; notes 2, 3, to *Stratton v. Best*, 1 V. 285; the notes to *Wake v. Wake*, 1 V. 335; note 3 to *Wilson v. Piggott*, 2 V. 351; note 3 to *Whistler v. Webster*, 2 V. 367; note 8 to *Bristow v. Ward*, 2 V. 336; note 1 to *Lady Cavan v. Pulleney*, 2 V. 544; and note 7 to *Thellusson v. Woodford*, 4 V. 227. With respect to the cases in which the recital of a gift has been held to amount to an actual gift, see the note to *Frederick v. Hall*, 1 V. 396.

BAILEY v. WRIGHT.

[ROLLS.—1811, MARCH 19, 21.]

UNDER a limitation in a marriage settlement of the wife's property, in default of her appointment, for her next of kin or personal representative, the husband not entitled (a).

By a settlement executed on the marriage of the Plaintiff Samuel Bailey and Miriam Orrell in 1794, a sum of 700*l.*, the fortune of the wife, was settled, in trust as to 500*l.* to place the same out at interest, and to * pay the yearly interest, &c. to Miriam [* 50] Orrell, the wife, for her separate use during their joint lives ; and in case she should survive, to pay the principal to her ; but in case she should happen to die in the life of her husband, then to pay the said principal sum of 500*l.* according to her appointment by any writing under her hand and seal, or by Will, and, in default of such appointment, in trust for the next of kin or personal representatives of the said Miriam Orrell ; and upon farther trust to place out at interest the remaining 200*l.* to the Plaintiff during his life upon his bond, and to pay the interest thereof to him, or to permit him to retain the same, during his life, and in case he should die in her life to pay the principal to her, but, if he should survive, then according to her appointment, &c., and, in default of appointment, in trust for the next of kin or personal representative of the said Miriam Orrell. No property of the husband was settled. The wife being dead without issue and without appointment, the bill was filed by the husband, claiming under the ultimate limitation against the sister of his wife.

Mr. Hall, for the Plaintiff.—The first consideration is, whether these words are to be taken as words of limitation, making the party take as a purchaser against the course of succession, prescribed by the law ; or in the construction of this settlement they mean any thing more than the death of the wife intestate ; pointing out, to whom the property should go in the case of intestacy ; as the words " next heir " do not give any particular individual a title to take real estate as a purchaser ; but merely denote the devolution by course of law. That is the whole effect of the words, as used in this settlement. The apparent tendency of some modern opinions to consider husband and * wife as in no respect of kin, or [* 51] related to each other, either during or after the coverture, cannot prevail against the uniform series of ancient authorities : Bracton (1), Glanville (2), and Littleton (3), treating them, not

(a) In the ordinary sense neither husband nor wife can be said to be next of kin to each other. See, *ante*, note (a) *Watt v. Watt*, 3 V. 244 ; 2 Kent, Com. (5th ed.) 136 ; note (a) *Devisme v. Mellish*, 5 V. 529 ; 2 Williams, Exec. 812, 813.

(1) Bract. Lib. 2, c. 5, sec. 5, fol. 12 ; Lib. 5, Tracts, 5, c. 25, sec. 10, fol. 429.

(2) Glanv. Lib. 14, c. 3, fol. 115 ; Mr. Beames's Translation, 356.

(3) Sec. 291.

merely as in the nearest degree related, but as forming one person: "*Unica Persona, caro Una et Sanguis Unus*," are the strong terms, by which their connection is on that foundation described. Lord Macclesfield, Lord Hardwicke, Lord Thurlow, and the Court of King's Bench, have expressly stated the husband to be next of kin to his wife. By the Statute of Distribution (1) and the Statute of Henry VIII. (2) the wife, being distinguished from the next of kin, shall not take in that character: but the husband has been held within the Equity of the Statute of Henry VIII. entitled to take out administration to her; which could be only as next of kin. The Statute of Distributions, not pointing to the relation of husband and wife upon the death of the wife intestate, and the Statute of Frauds (3), declaring, that nothing in the former Act shall extend to *femes covert*, that shall die intestate, but that their husbands may demand and have administration of their personal estates, and recover and enjoy the same as they might have done before the said Act, have no effect whatsoever. Upon various authorities the effect of the relation continues after dissolution of the marriage: the husband has administration to his wife, not by virtue of the marital right, but [* 52] as next of kin: *The King v. Dr. Bettesworth* (4); *Cart v. Rees*, mentioned in *Squib v. Wigan* (5); *Elliot v. Collier* (6); and *Fettiplace v. Gorges* (7); where Lord Thurlow expresses that opinion in terms. In *Siderfin* (8) the reason is given: no other being in *aquili gradu*. In *Humphrey v. Bullen* (9) Lord Hardwicke, adopting the language of the Statute (10) of Edward III. says, "during the coverture they are but one person; but when the coverture is dissolved by the death of the wife, the husband is certainly the next friend and nearest relation; and has a right to administer exclusive of all other persons."

The judgment of Lord Loughborough, in the case of *Watt v. Watt* (11) does not clash with these authorities: the words "of her own family," added to the description of "next of kin" of the wife, excluding the husband. In *Griffin v. Nanson* (12) Lord Alvanley had no conception, that, if the settlor had married, his widow would not have been entitled under the description of next of kin; though the cases of husband and wife are very different with regard to this question. In the late case, *Nichols v. Savage* (13), the widow was

(1) Stat. 22 and 23 Ch. II. c. 10.

(2) Stat. 21 Hen. VIII. c. 5.

(3) Stat. 29 Ch. II. c. 3.

(4) 2 Str. 1111.

(5) 1 P. Will. 381.

(6) 1 Ves. 15; 3 Atk. 526; 1 Wils. 168.

(7) 3 Bro. C. C. 8; *ante*, vol. i. 46.

(8) Sid. 409.

(9) 1 Atk. 458.

(10) Stat. 31 Edw. III. c. 11.

(11) *Ante*, vol. iii. 244; see the note, 247.

(12) *Ante*, vol. iv. 344.

(13) At the Rolls, 5th March, 1810: cited from a manuscript note of Mr. Wetherell.

held not entitled under the description of next of kin, that would have been entitled to the personal estate under the Statute, in case he had died intestate: a decision, not to be disputed: the widow and next of kin being by the Statute put in opposition. The Lord Chancellor made a similar decision in *Garrick v. Lord Camden* (1).

* At least the Plaintiff is entitled under the farther description "personal representative." The right of the husband to succeed to the property of his wife is, as the title of the heir at law, considered with favor. The effect of these words is the same as if the property had been directed to go by devolution of law. [* 53]

Mr. *Wetherell*, for the Defendants.—This is decided in principle by the last case, *Nichols v. Savage*: a residuary bequest "to all and every my next of kin that would have been entitled to my personal estate under the Statute made for distribution of intestate's estates, in case I had died intestate:" it was clearly decided, that the widow was not entitled to a share: proving with the Lord Chancellor's judgment in *Garrick v. Lord Camden* the uniform opinion of the Court; and removing all argument upon *Dicta* to be found as to the interpretation of the words "next of kin." The Lord Chancellor says (2), whatever may have dropt from Judges, describing the husband as next of kin of his wife, the whole course of modern authority is against the construction, that either can take under the simple description of next of kin of the other; clearly adverting to the case of *The King v. Bettesworth* (3); where those words are used inaccurately. In *Davis v. Baily* (4) and *Worseley v. Johnson* (5) Lord Hardwicke held the widow not included under the term "relation;" observing, that strictly the wife is no relation to her husband. Lord Loughborough decided the case of *Watt v. Watt* (6), not on the peculiar expression of the settlement, but on the broad ground, that the husband is not next of kin of his wife. The course of the modern * authorities is therefore uniform; that the [* 54] *Dicta*, describing husband and wife as next of kin to each other, are inaccurate; and it is obvious, that between them relation cannot subsist in the sense of Sir William Blackstone, as persons *de eodem Stipite descendentes*.

The additional description in this settlement, "or personal representative" though not in law precisely synonymous with "next of kin" must, as here used, receive the same construction. Who may be entitled to administration is an accident, that cannot be regarded in the construction of an instrument. In the two last cases, *Garrick v. Lord Camden* and *Nichols v. Savage*, where there was the same conflict between the different parts of the sentence, the first description

(1) *Ante*, vol. xiv. 372.

(2) *Ante*, vol. xiv. 381.

(3) 2 Str. 1111.

(4) 1 Ves. 84.

(5) 3 Atk. 758.

(6) *Ante*, vol. iii. 244.

"next of kin" was held to convey the real meaning ; and no effect was given to the added words.

Mr. *Hall*, in reply, observed, that there is a material distinction between husband and wife, with regard to character and succession ; that the particular terms of the settlement in *Watt v. Watt* were the principal foundation of the judgment ; and that in *Nichols v. Savage* the description was next of kin, that would have been entitled to the personal estate under the Statute of Distributions ; under which the widow takes in her peculiar character, not as next of kin.

March 21st. The MASTER OF THE ROLLS [SIR WILLIAM GRANT].—The question before the Court is not, whether the husband can in any case or for any purpose be, as he has sometimes been called, the next of kin of his wife : but, whether according to the true construction of this settlement it was intended, that the husband should take under that denomination. In the cases, where the husband [* 55] * has been spoken of as next of kin of his wife, the only thing in question was his right to administer ; and that right has frequently been called his right as next of kin. In those cases there was no occasion to consider, whether by a limitation to the next of kin of the wife he would be entitled to her property after her death. In the case of *Watt v. Watt* (1) that precise question came before Lord Loughborough ; and he did determine it ; for though in some clauses of the settlement, not in all, the words "of her family" were added to the description "next of kin," yet the clear opinion of the Lord Chancellor was, that he did not at all answer the description ; and the present Lord Chancellor in the case of *Garrick v. Lord Camden* declared the same opinion ; though it was not the point immediately before him.

In this case it is impossible, that the husband could be intended. The subject of the settlement was the wife's fortune of 700*l.* The only benefit he was to take was the interest for his life in 200*l.* part of that fund ; and she was to have the interest of the remainder for her separate use : if she survived, the whole was to be her's ; if he survived, it was to go according to her appointment ; and in default of appointment, in trust to her next of kin or personal representative.

It seems to me, the intention was evidently to exclude him. Had it been meant, that he should take by surviving her, the expression was quite obvious, that in that event and in default of appointment the whole of these two sums should be paid to the said Samuel Bailey for his own use. Both are mentioned by their names, wherever they are spoken of in this settlement : but they had a view to [* 56] uncertain persons ; who could be designated only by some general description. Indeed it seems hardly conceivable, that in a marriage settlement a limitation to the wife's "next of kin" can be introduced, except for the purpose of excluding the husband ;

(1) *Ante*, vol. iii. 244 ; see the note 247.

and if the intention was to exclude him by the first words "next of kin," he cannot be let in under the subsequent words "personal representative." Whatever these words might mean, standing by themselves, they cannot, as here used, take from the first words the sense they properly bear, and were in this case obviously intended to bear.

The Bill of the husband must therefore be dismissed with costs.

1. SAMENESS of blood is necessary to constitute "kindred." The mutual relation existing between husband and wife, however sacred the connexion, does not make the parties of kin to each other, but rather implies the reverse, as the marriage of kindred, within certain degrees of consanguinity, is prohibited: and the prohibition might be rested on obvious moral precautions, and strong physical reasons, independently of the Levitical code. A husband's claim to the personal property of his deceased wife, not disposed of by her, is a claim which he can only assert *jure mariti*, not as her next of kin: see, *ante*, note 2 to *Fettiplace v. Gorges*, 1 V. 46. Nor would the husband be entitled, if his wife, by a will duly made under a power to that effect, had bequeathed her separate personal estate to her next of kin: *Garrick v. Lord Camden*, 4 Ves. 382.

2. As to the double construction which the term "real representative" may bear, see the note to *Jennings v. Gallimore*, 3 V. 146.

HILL v. BARCLAY.

[1811, APRIL 30; MAY 13.]

RELIEF against forfeiture of a lease for breach of covenant not extended beyond the case of payment of money, as in the instance of rent, to the other covenants; as to repair (a).

Stat. 4 Geo. II. c. 28, regulating the relief of a tenant against a forfeiture for a breach of covenant by non-payment of rent, [p. 60.]

The ground in *Hack v. Leonard* (9 Mod. 91) for relief against breach of covenant to repair, if not such as to make repair before the end of the term impracticable, disapproved, [p. 61.]

Tenant, having committed breaches of covenant by waste, treating the land in an unhusband-like manner, &c. not entitled to specific performance of an agreement for a lease, [p. 63.]

No relief against forfeiture by breach of covenant not to assign without license, [p. 63.]

THIS case (1), having been again argued upon a Motion to dissolve the Injunction, stood for judgment.

Sir Samuel Romilly, and Mr. Wingfield, for the Defendant: Sir Arthur Piggoth, Mr. Richards, and Mr. Agar, for the Plaintiff.

(a) See, *ante*, note (a) *Sanders v. Pope*, 12 V. 282; *ante*, notes, S. C. 16 V. 402. On this case Mr. Justice Story remarks; "Lord Eldon, speaking of the relief given in cases of non-payment of rent, said, it was 'upon a principle long acknowledged in this Court, but utterly without foundation.' Why, without foundation? It proceeds upon the intelligible principle, that the right of re-entry is intended as a mere security. If it is so intended, there is the same ground for relief, as in case of a forfeiture by non-payment of the money, due upon a mortgage, at the day appointed. Nobody doubts the justice and conscientiousness of interfering in the latter case. Why is it not equally proper in the former?" 2 Story, Eq. Jur. § 1315, note. See *post*, notes (a) and (b) *Reynolds v. Pitt*, 19 V. 134.

(1) Reported, *ante*, vol. xvi. 402.

The Lord CHANCELLOR [ELDON].—The legal effect of the covenants in this lease is, that if the tenant did not within a limited time after entry lay out 150*l.* at least, or did not keep the premises in repair, or, if the landlord chose to dispense with that circumstance, *and give notice to the tenant to put them in complete repair within three months, and he did not so repair, the landlord has by the express contract a right to enter, and determine the interest of the tenant. The effect of these covenants at law may be put another way; that this was to be a lease, until the tenant should after three months' notice fail to put the premises in complete repair.

The Bill suggests, that an Equity to be relieved against the forfeiture at Law by breach of the covenant arises out of a difference in the Ecclesiastical Court upon Hill's Will. I think, as Lord Erskine thought in *Sanders v. Pope* (1), that the circumstance of the Will of the assignee of the lease being in controversy in the Ecclesiastical Court, as it would certainly form no answer to an Ejectment, so of itself it cannot be a ground for relief in Equity. For the Plaintiff it has been insisted, that the notice to do the repairs was given at an inconvenient season (in September); that it was required at a time, when probably the repairs could not on account of the weather be completed; and, admitting, that no step was taken, though in fact there was nothing to prevent the repair within the time, it is contended, that their so reasoning upon the time is a circumstance, that entitles them to a relief in Equity; that, having began to repair in January, after the ejectment brought, they were proceeding; and the house would have been put in as good repair as if the notice had been complied with; and upon these grounds this Court relieves against an Ejectment. The Bill contends farther, that a sum of money sufficient to put the premises in complete repair, being laid out after the time specified in the covenant, they will be [* 58] put in complete repair; and therefore this *Court ought to give relief upon a principle of Equity, resulting from that act of the tenant, putting them in such complete repair; and a controversy is raised by the affidavits on each side with regard to this point, which I find it extremely difficult to understand, whether the premises are not considerably better for not having been repaired until after the time, than if the repairs had been done at the time stipulated; that is, whether the effect of the winter being past does not make the state of repair more complete and desirable, than if it had been done in the preceding September.

Upon these grounds the Motion was made for an Injunction to restrain the Ejectment; against which, it was admitted, there could be no defence at Law; and the tenant was therefore required to give judgment, subject to such terms as the Court should think reasonable. The question now is, whether upon such circumstances as are now before me, the principle of Equity will maintain me in holding, that a landlord shall not have the legal effect of his covenant. Very mod-

(1) *Ante*, vol. xii. 282. See the notes, x. 70; iii. 683.

ern times have produced two cases, perhaps not quite so contradictory as they appear to be ; though it may not be very easy to reconcile the principles, supposed to govern them. In *Wadman v. Calcraft* (1) the Master of the Rolls lays down, as doctrine, making a strong impression on his mind, that, though against an Ejectment for non-payment of rent the Court would relieve, upon a principle long acknowledged in this Court, but utterly without foundation, it would not relieve, where the right of the landlord accrued, not by non-payment of rent, but by non-performance of covenants, which might be compensated by damages. That case coming afterwards before me, my mind was so strongly impressed with the distinction

between this sort of covenant and a covenant for non-payment of a sum of money, or rent, that I acted upon the distinction ; and put the party to an immediate inquiry, to ascertain, whether upon the non-performance of this species of covenant the right of entry could be acted upon at Law ; and, as it appeared, that the ejectment might be maintained, no relief was given. [59]

The decision of the subsequent case of *Sanders v. Pope* (2) does not seem to me to govern this case. The tenant there, not having laid out the sum of 200*l.* in repairs within the period expressed by the covenant, offered afterwards to lay out that sum ; and it does not appear, that there has been any dealing by request and refusal between the lessor and lessee in the period, during which by the express covenant the money ought to have been applied. The Injunction, which had been continued by an Order of the Master of the Rolls, implies a declaration of his opinion, that the case was to be regarded as a case, that might admit relief. Lord Erskine's opinion also was, that the covenant specifying a liquidated sum to be laid out within a given time, and as the landlord could not be injured by the expenditure of that sum, with an increase after the time had expired, and all the costs, relief was in the discretion of the Court.

The original cases upon this subject are of different sorts. The Court has very long held, in a great variety of classes of cases, that in the instance of a covenant to pay a sum of money the Court so clearly sees, or rather fancies, the amount of damage, arising from non-payment at the time stipulated, that it takes upon itself to act, as if it was certain, that giving the money five years afterwards *with interest it gives a complete compensation. [* 60] That doctrine has been recognised without any doubt upon leases with reference to non-payment of rent, upon conditions precedent, as to acts to be done, payment of money in cases of specific performance, and various other instances : but the Court has certainly affected to justify that right, which it has assumed, to set aside the legal contracts of men, dispensing with the actual specific performance, upon the notion, that it places them, as near as can be, in the same situation as if the contract had been with the utmost precision specifically performed : yet the result of experience is, that,

(1) *Ante*, vol. x. 67 ; see the note, 70.

(2) *Ante*, vol. xii. 262.

where a man, having contracted to sell his estate, is placed in this situation, that he cannot know, whether he is to receive the price, when it ought to be paid, the very circumstance, that the condition is not performed at the time stipulated, may prove his ruin, notwithstanding all the Court can offer as compensation.

There is however no doubt, that the Court has always acted upon this as to rent ; and there is also legislative authority for it by the Statute (1), which passed in 1731, regulating the powers of Courts of Equity in that article, limiting the time, within which the lessee, who has failed in paying his rent, may file a Bill to have his lease restored ; specifying the terms, upon which the relation, though according to the contract at an end, shall upon the equitable doctrine, aided by legislative provision, continue in force between them. If it was understood at that time, that in a great variety of other cases this Court upon its equitable doctrine would relieve against forfeiture, among other instances in this of a wilful neglect to repair, if it was

then the acknowledged doctrine of this Court, that the [* 61] lease, forfeited by the contract, * might be set up again by the tenant, coming at any time with an offer to do that, which he had wilfully omitted at the time he had stipulated, it is much to be lamented, that the power of the Legislature was not interposed in a case, upon which its interference was much more desirable. Imperfect and unjust as the operation of the rule for giving relief in Equity against a forfeiture for non-payment of money must be in some cases, yet, if the rule is established, that payment with interest from the time is a compensation, that is an extremely simple rule for administering the Equity ; but, if a Court of Equity is to trust itself in all cases with the consideration of such a question as this, whether it is just, that a tenant should come here to prolong the duration of a lease, by his express contract determined, if the property has not been treated in a husband-like manner, the Court has not so sure a guide as the calculation of interest upon a sum of money ; and, considering the depositions of Surveyors in this Court, or the declarations of one of these Plaintiffs, as represented by the answer, that the premises are in such circumstances, that, when all the repairs are made, it will be a bad business, the notion, that the Court upon such evidence can be sure, that it gives the party a compensation in damages, appears ridiculous.

I notice this particularly on account of one case (2) ; where the Lord Chancellor appears to go a length, to which no Judge should follow without great consideration. According to the note, which is but loose, his Lordship seems to have thought, that the equitable jurisdiction might be applied on this ground ; that if the repairs of the premises, under a covenant always to be kept good, are done at the close of the term, the landlord would have his premises in excellent condition * from their not being done

[* 62]

(1) Stat. 4 Geo. II. c. 28, s. 2, 3, 4.

(2) *Hack v. Leonard*, 9 Mod. 91.

sooner. The Court is surely not authorized so to deal with contracts. I do not mean to apply these observations to cases of accident and surprise; the effect of the weather for instance, in this case, or permissive want of repair: the landlord standing by and looking on. A particular case might perhaps occur, such as are put by Lord Erskine in *Sanders v. Pope*, in which it would be demonstrable, that the landlord would sustain no injury by the relief: but it is taking a prodigious liberty with a contract, by which the tenant has undertaken forthwith to repair, and to keep the premises in repair constantly; in order that the landlord may during the whole currency of the term have the property, if returned upon his hands, in exactly the state he intended.

If this doctrine can be maintained in general cases, what is to be said of the case, where the Court administering this species of equity, the tenant has become bankrupt before the end of the term, the assignees refuse to take to the lease, and the premises are thrown back to the lessor in a state of utter non-repair? Would that be any thing like an execution of the contract? So in the case of copyhold estate, where there is a forfeiture upon waste. The distinctions, that have been taken, go, not only to the question, where it is perfectly clear, that compensation for the damage can be made in this respect, that the landlord can be placed in the same situation to all intents and purposes, but also to another very material consideration; whether the non-payment of the money, or the waste, was wilful, or not. There may be cases, where, morally speaking, a Court of Equity would interpose with much less reluctance than in another sort of case; where, for instance, the landlord offered to overlook the past negligence on condition, that the repairs should be *done within three months; if the tenant still [* 63] refused, upon what ground, having wilfully refused, and violated all his covenants, could he desire a Court of Equity to place him in exactly the same situation as if he had performed them, and demand a Decree, giving him the benefit of the offer, which he had positively refused?

So, with regard to other cases, the doctrine I have repeatedly stated is all wrong, if it is to be taken, that relief is to be given in case of a wilful breach of covenant. I allude to cases, where I have intimated my opinion, that a tenant, who has committed waste, treated the land in an unhusband-like manner, and been guilty of various breaches of covenant, for which the lessor had a right of re-entry, should not have a specific performance of an agreement for a lease. The effect of omitting repairs may produce as much mischief to the estate as waste; the latter is as capable of compensation as the former; and there is no difference between covenants, thus resting in damages, and another, against the breach of which it is admitted the Court will not relieve, a covenant not to assign without license; upon which it is clearly settled, that, if an ejectment is brought upon a right of re-entry reserved, the lessee can have no relief: he cannot show, that by the assignment the

lessor sustains no damage ; that on the contrary he, the lessee, is a beggar, who could not pay the rent, and the assignee a solvent tenant ; that the lessor is therefore in a better condition ; having two persons answerable to him instead of one tenant under the circumstances I have mentioned. The answer is, that the Court cannot estimate the damage : the fact, as it is alleged, may be true at this moment : but the consideration, whether the lessor is to gain or lose by having a tenant put upon him, must run through the [* 64] whole continuance * of the lease : it is sufficient, that the lessor insists upon his covenant ; and no one has a right to put him in a different situation. The distinction has been taken, that relief may be had against the breach of a covenant to pay money at a given day ; but, not, where any thing else is to be done. So the case of forfeiture of a copyhold by acts, which really do no damage to the lord, as where a tenant for life forfeits his estate, stands on the same ground. In all these cases the law having ascertained the contract, and the rights of the contracting parties, a Court of Equity ought not to interfere.

With regard to the circumstance of this case I take the lessor, calling for the repairs to be done within three months, to have dispensed with his right of entry under the general covenant : but, the premises being at that period in a state of gross dilapidation, the lessor says, he, who was entitled to have them put in repair at the commencement of the lease, and to have them kept in repair to that time, having also, as being entitled to the benefit of all circumstances, affecting the value of the lease in future time, the right to require the repairs to be done within three months, did make that requisition ; expressly signifying, that, if they were not done within that time, he would avail himself of his legal right. Not one step was taken in compliance with that requisition. Am I then to speculate under such circumstances ; and determine, that it is so clear, that the repairs, if done in future, will be equally, or more, beneficial, that all the contract between them should be undone ? My opinion is, that this is more than is authorised by any decision ; and therefore the Injunction must be dissolved.

SEE, *ante*, the notes to *S. C.*, 16 V. 402.

PARR, *Ex parte* (1).

[1811, MAY 15.]

CREDITOR'S right in bankruptcy to prove and avail himself of all collateral securities from third persons to the extent of 20s. in the pound.

Bills drawn and accepted by the same persons, as constituting distinct firms: proof against the acceptor without deducting the value of a security from the drawer.

Separate creditors not entitled to vote in the choice of assignees under a joint Commission. On that ground a new choice directed: though the Lord Chancellor would not interfere, if a creditor had been excluded by mistake, not for the purpose of preventing his voting.

Joint creditors cannot vote in the choice of assignees under a separate Commission, even if there is only one separate creditor: but an arrangement will be made for the joint creditors by order, [p. 70.]

The choice of assignees is with the creditors, entitled to prove under the act of Parliament; excluding persons, who could not be admitted without an order; as separate creditors under a joint Commission; now admitted under the General Order (8th March, 1794), [p. 70.]

THIS Petition stated, that in February, 1811, a Commission of Bankruptcy issued against Leigh and Armstrong, of Liverpool, carrying on trade under the firm of Leigh and Armstrong; and that they were indebted to the petitioner James Parr; as surviving partner of John Parr, deceased, in the sum of 12,238*l.* 14*s.* 2*d.* for principal and interest on fourteen bills of exchange, drawn by persons at Demarara, under the firm of Brumel, Heyliger, and Co., in favor of John and James Parr, and accepted by the bankrupts; which bills were given by Heyliger and Co. to John and James Parr for moneys actually received by Brumell and Co. to and for the use of John and James Parr to the full amount. A debt of 4340*l.* was claimed by the other petitioners Shaw and Co., under similar circumstances.

The Petition then stated, that, Leigh and Armstrong not having paid the bills, Brumell and Heyliger, being pressed by the petitioners, assigned to them two plantations at Essequibo and Berbice, in America, in mortgage, for the purpose of securing the balance due upon the bills, by indentures, dated the 1st of January, 1806; and it was expressly covenanted, agreed, and understood, that the security, thereby given, should not be considered as any waiver of the security, which the petitioners Parr and Shaw respectively should have against the acceptors of the bills, or any other by virtue of them, except Brumell *and Heyliger; nor against them [* 66] farther than giving them time for payment.

The Petition farther stated, that the Commissioners rejected the proof of the petitioners, until they had disposed of the mortgage; or until it should have been valued; holding, that they could only prove the balances of their respective debts, after deducting the price or value of the mortgage. The petitioners stated to the Commissioners, that, if allowed to prove, they should vote for Thomas Parr

to be the assignee; who was proposed by another joint creditor; and the majority in value of the joint creditors present, whose debts amounted to 10*l.* voted for Thomas Parr: but the Commissioners declared, that he was not elected assignee; and, the majority in value of the separate creditors present, whose debts amounted to 10*l.*, having voted for three other persons, and the amount of the debts of those separate creditors exceeding the amount of the joint creditors, who had been allowed to prove, and who voted for Parr, the other three persons were declared the assignees.

The Petition prayed, that the petitioners may be admitted creditors under the Commission, and be paid dividends rateably with the other joint creditors; and that Thomas Parr may be declared to have been duly elected sole assignee; or, that a new choice of assignees may be had.

An affidavit, made by the bankrupts, stated, that previously to 1799 they carried on business at Liverpool as merchants under the firm of Leigh and Co., and under the firm of Armstrong and Co. at Demarara, and in 1799 they took into partnership with them at Demarara Heyliger, and soon afterwards Brumell. The deponents put an end to that partnership in 1801: the accounts were [* 67] never finally settled; and a considerable balance will *be due upon a settlement from Brumell and Heyliger. The Bills in the petition mentioned arose out of the said partnership transactions; and were drawn and accepted, while the deponents and Brumell and Heyliger were so in partnership; and the mortgage was obtained as a farther security for the bills.

Mr. *Leach* and Mr. *Agar*, in support of the Petition.—Two objections are made by this petition: first, that the Commissioners acted erroneously in refusing the proof, until the security had been made available; secondly, that under a joint Commission a choice of assignees by separate creditors cannot be supported. The reason for refusing the proof upon these Bills was, that the petitioners held another security from the drawers. Upon what principle can that stand? It would be correct if they held a security on the bankrupt's estate; which is *prima facie* a satisfaction; but with regard to distinct security from another person, the creditor has a right to avail himself of all his securities (1.) The acceptor, if an action was brought against him, could not object, that the holder had other security from the drawer. It is true, Leigh and Armstrong, the bankrupts, were partners in the house at Demarara; and admitting that house to have been debtor to the house in London, the objection would be, that the creditor, giving time to the principal, discharges the surety; but the creditor had no knowledge, that the acceptor was, not the principal debtor, but in truth a surety; having accepted without consideration.

With regard to the choice of assignees, admitting the rule of con-

(1) *Ex parte Bloxham*, ante, vol. vi. 449, 600. A distinction was taken by the Vice Chancellor, where the contract was immediately between the creditor and the surety: *Ex parte Reader*, Buck, 381.

venience, that your Lordship will not interfere, unless some creditor has been excluded for the very purpose of obtaining that choice, this case has sufficient * grounds for setting aside [* 68] the choice. If the choice of assignees is with the joint creditors, Thomas Parr was duly chosen: only one joint creditor voting against him. The question therefore is, whether the separate creditors had any right to vote; depending, not on usage, but positive law. They are not creditors within the sense of the Act of Parliament (1); which directs the choice of assignees to be by those creditors who could prove under the Act. The separate creditors, are not entitled to prove by the authority of the Act; but are admitted to prove their debts under the General Order (2); that they may have the separate property administered for their benefit. The effect of such an arrangement, whether by a general or special order, is the same. They are admitted, not under the statute, but by the special equitable jurisdiction of the Lord Chancellor, by analogy, to the case of joint creditors applying to prove under a separate Commission; which, for the purpose of voting in the choice of assignees, or receiving dividends, is constantly refused, unless in the excepted cases; as, where the separate creditors are paid 20s. in the pound (3).

Sir *Samuel Romilly* and Mr. *Bell*, for the Assignees.—These petitioners holding bills, drawn by the house at Demarara upon, and accepted, by the house at Liverpool, the members of which house also were partners in the house at Demarara, cannot be admitted to prove, until they have made available another security, which they hold.

* The rule as to the choice of assignees is, that your [* 69] Lordship will not interfere merely on the ground, that, some creditor has voted, who strictly had not a right to vote: but, something more must be shown; as in a late instance, that a creditor was prevented from proving for the mere purpose of preventing his voting in the choice of assignees; and was permitted to prove after the assignees were chosen (4). The practice is to permit the separate creditors to vote; and it would be most unjust, that an arrangement for the purpose of general convenience, and to prevent expense, should affect the rights of any class of creditors.

The Lord CHANCELLOR [ELDON].—As to the right of the petitioners to prove without bringing to market their security, if it stood simply upon this state of circumstances, a house in Demarara drawing upon another house in London, and that house accepting, and the drawers, having, when they drew, given another security, the acceptor is liable *prima facie*; and, unless he had been discharged by some dealing, the circumstance of a security taken will not author-

(1) Stat. 5 Geo. II. c. 30, s. 26.

(2) General Order, 8th March, 1794; 4 Bro. C. C. 548.

(3) *Ante*, *Ex parte Detastet*, vol. xvii. 247; *Ex parte Taitt*, xvi. 193; *Ex parte Ackerman*, xiv. 604; see the note, iii. 243, *Ex parte Elton*.

(4) *Ex parte De Tastet*, 1 Ves. & Bea. 280.

ise the Commissioners to refuse the proof. It is said however, that the house at Liverpool was partner with the other house: but it has been established above thirty years, that the same persons may be both drawers and acceptors, as constituting different firms. The petitioners have therefore a right to prove without deducting the value of the security; and the question between the two houses will arise after the proof of the whole debt; and will affect the dealing with this property, after they have paid 20s. in the pound, and not before (1).

[* 70] * The rule is correctly stated at the Bar, that it is not the habit to interfere with the choice of assignees merely on account of a mistake of the Commissioners, excluding one creditor; if it occurred in the fair exercise of their discretion: but this is not a case of that sort: the objection being, that this is a choice of assignees by persons, who had no right whatsoever to choose them. In the case of a separate Commission it has been frequently determined, that though an arrangement will be made here for the joint creditors, they cannot vote in the choice of assignees; which before Lord Thurlow went this length, that the creditor, who took out the Commission, if there was no other separate creditor, might choose himself; and in one instance Lord Thurlow appointed, at the expense of the joint estate, persons to deal with that estate adverse to the separate creditors; as a sort of trustees; refusing to make them assignees. The converse of that rule must be equally true; that separate creditors cannot vote in the choice of assignees, under a joint Commission: the choice being with those creditors, who go in, not by the particular order made here, but by their right under the Act of Parliament; and those creditors, who now go in under that General Order, made by Lord Rosslyn, before could not have gone in without a particular Order under the Lord Chancellor's general jurisdiction to dispose of the bankrupt's property; and generally, before they could obtain that Order by application here, the assignees were chosen.

The Order declared the petitioners entitled to prove their debt without deducting the value of the security they held; and directed, that another meeting should be held for the choice of assignees (2).

1. This case is likewise reported in 1 Rose, 76.

2. A creditor has a right to prove, under a commission of bankruptcy, the full amount of his debt, and at the same time go on to avail himself of all collateral securities against third persons, until he has received twenty shillings in the pound upon his actual debt: see, *ante*, note 1 to *Ex parte Bloxham*, 4 V. 448.

3. Where one general firm has been also subdivided into several distinct firms, which trade separately, though the individuals engaged in the branch establishments are all partners in one joint concern, the holder of a bill drawn by the general partnership upon one of the branch partnerships, may prove against, and take dividends out of, both estates, should they become bankrupt; or may have

(1) *Ante*, vol. viii. 546, *Ex parte Bonbonus*.

(2) See *Ex parte Longman*, the next case; *Ex parte Jepson*, *post*, vol. xix. 224.

recourse to either which may continue solvent, though he has proved under a commission against the other firm: see note 7 to *Curtis v. Perry*, 6 V. 739.

4. The improper rejection, by the commissioners, of the proof of a creditor whose vote might have altered the choice of assignees, is a measure to be reprehended; but it would be a still more serious mischief if the choice of assignees were, universally, to be declared void, whenever a proof has been improperly rejected; *Ex parte Durent*, Buck, 201; *Ex parte Surtees*, 12 Ves. 12. Still, there are cases in which the rejection of proof may have been followed by such effects, that it must be considered, that there has been, substantially, no choice (*Ex parte Ackroyd*, 1 Glyn & Jameson, 394); and in such case a new choice of assignees, after the due reception of proof, may be directed: *Ex parte Edwards*, Buck, 411; *Ex parte Hawkins*, Buck, 521.

5. It was said, in the principal case, that, when a rule is once established, as to the claim of joint creditors to prove in the choice of assignees under a separate commission, the converse of that rule must equally hold, as to the claim of separate creditors to vote in the choice of assignees under a joint commission. Unless this *dictum* was intended to be limited, in its application, to cases only in which creditors went in to prove under Lord Rosslyn's general order, separate creditors may now prove under a joint commission, for the purpose of voting in the choice of assignees; for joint creditors are expressly allowed to prove under separate commissions, for the purpose above stated, by the 62nd section of the statute of 6 Geo. IV., c. 16.

LONGMAN, *Ex parte*.

[* 71]

[1811, MAY 15.]

JOINT creditors not entitled to vote in the choice of assignees under a separate Commission: the choice being in the creditors, who went in by their right under the act of Parliament, not under an Order.

General Order in Bankruptcy (8th March, 1794) not intended to alter the rights of joint and separate creditors with regard to each other.

UNDER a separate Commission of Bankruptcy this petition was presented by joint creditors of the bankrupt and his partner, John Drake, who was in Portugal; stating, that by an Order, reciting, that the assignees under the separate Commission had possessed joint property, it was ordered, that the petitioners and the other joint creditors should be admitted to prove under the separate Commission. The petition prayed, that the assignees may be removed; and that a meeting may be directed for the choice of new assignees.

Sir Samuel Romilly and Mr. Cullen, in support of the Petition. Under the circumstances a new choice was ordered: but the joint creditors were not permitted to vote in the choice.

The Lord CHANCELLOR [ELDON] said, he thought the practice of letting joint creditors vote in the choice of assignees under a separate Commission wrong: he did not conceive Lord Rosslyn's General Order was by any means intended to alter the rights of joint and separate creditors with regard to each other: and the choice of assignees was to be by the creditors, who before went in by their right

under the Act of Parliament, not under the effect of a particular Order made here (1).

SEE note 5 to the last preceding case.

[* 72]

SAXTON v. DAVIS (2).

[1811, MAY 8.]

BILL by a bankrupt, and the assignee under an Insolvent Act, of which he afterwards took the benefit against representatives of the deceased assignees, and others, for an account of his estate and various transactions before and since the bankruptcy: no assignee in the bankruptcy being a party, and collusion with persons accountable to the estate charged against only some of the representatives of the assignees.

Demurrer allowed, generally for want of Equity, and as relief might be had by petition in bankruptcy; and *ore tenus*, the suit being multifarious; as uniting parties, though in some respect connected, having distinct interests.

Prayer material in construing charges not direct, [p. 80.]

Bankrupt's right to petition in respect of his interest in the surplus, [p. 81.]

THE Bill, filed by Daniel Saxton and Robert Jones, stated, that the Plaintiff Jones, a carpenter and builder at Bristol, was in 1793 possessed of considerable property: and, having engaged to assist persons, to whom he had made building leases, in 1792 he employed the Defendant Henry Davis, as his attorney, and to act generally as his agent; who undertook to procure him money; that various transactions accordingly passed between them; and in the result the property, received by Davis, far exceeds what was justly due to him; and upon a fair account a considerable sum is due from him to the Plaintiff.

The Bill farther represented, that, the Plaintiff Jones having deposited all his title-deeds with Davis, and placing the most unbounded confidence in him, he obtained the absolute control of all the Plaintiff's affairs; and stated various transactions, mortgages and sales, fraudulent conveyances to himself under pretence of mortgage, refusing to let Jones read the deeds, before he executed, securities obtained by threats, without consideration, &c.; that by these transactions Jones became embarrassed; and on the 22d of March, 1793, was arrested, and committed to prison for want of bail; where he remained till November, 1795: but on the 17th of April, 1793,

[* 73] a Commission of Bankruptcy issued against * him; under which he was declared a bankrupt. Davis himself sued out and prosecuted that Commission; and had the sole and exclusive management and direction of it; and he caused Richard George and Richard Farman, his particular friends, to be chosen assignees. Far-

(1) *Ex parte Parr*, the preceding case. See the note, *ante*, vol. iii. 243, *Ex parte Elton*.

(2) 1 *Rose's Bankrupt Cases*, 79.

man died ; having accounted with George for his acts as assignee. George afterwards died ; having appointed the Defendant Bence one of his executors : after the death of Farman no other assignee was appointed for a considerable time : but some time afterwards the Defendant Henry Pater was by the instigation and influence of Davis chosen assignee : but no regular assignment has been made to him ; and he was only chosen as a color, and to countenance the bankruptcy.

The Bill farther stated, that Jones, having been thus defrauded by Davis of the whole of his property, and having been in confinement nearly three years, took the benefit of the Insolvent Act 34th and 35th Geo. III. under which his estate and effects were conveyed and assigned to the Defendant John Long in trust for himself and all the other creditors of Jones ; and that Long, instead of bringing Davis to account, abetted him, and was an active party in many of his acts ; and in consequence Long was by an order of the Court of King's Bench removed from being the assignee under the Insolvent Act ; and the Plaintiff Saxton was appointed assignee in his room ; and is now the assignee under the Insolvent Act ; that no part of the estate of Jones was fairly sold under the Commission of Bankruptcy ; but Davis has possessed himself of the whole under some pretended right or assumed trust ; and has never accounted.

The Bill, then stating applications by the Plaintiffs to Davis, to account, and restore the property, to Bence, the surviving executor of George, to account for George's * acts, receipts, [* 74] &c. under the Commission, and assign to Saxton, applications to Long, for the same purpose, and to Pater to assign to Saxton all right and interest under the Commission, charged all the allegations before stated, and particularly that Davis has in some manner satisfied all or the most part of Jones's creditors, and obtained from them discharges for their respective claims : but he did not pay to them the whole amount of their respective demands, but some small sum in lieu thereof ; and there has never been any dividend declared under the Commission ; that at the death of George he was indebted to Jones's estate on account of his assigneeship ; and Bence refuses to account to Saxton ; that Long, while he was assignee under the Insolvent Act, possessed divers parts of the estate ; and has never accounted for the same ; and he also conveyed and assigned to or in trust for Davis divers parts of Jones's real and leasehold property and effects without any valuable consideration, and at the instigation and under the directions of Davis ; and the Defendants Ashton and Evans were stated to claim some interest as trustees under Jones's marriage settlement.

The Bill prayed, that Davis may account for his receipts and payments, and pay to Saxton what shall be found due ; and that he may account for the real and leasehold estates and other property, &c. ; that his purchases may be declared fraudulent, and be set aside against the Plaintiffs and the creditors ; that he may be declared a trustee for the Plaintiff as to all mortgages and incumbrances paid

off, bought up, or otherwise discharged, &c.; and accounts were prayed against Bence of George's receipts and payments, and of his personal estate, if necessary; and against Long and Pater, respectively; and that they may respectively pay and assign to the Plaintiff Saxton.

[* 75] To this Bill a joint demurrer was put in by the Defendants Davis, Bence, Pater, and Evans, on two grounds: first, that the Plaintiffs have not by their Bill made such a case as entitles them to discovery and relief: secondly, that it appears by the Plaintiff's own showing, that, if entitled, they might have full and complete relief under the jurisdiction of the Lord Chancellor in the bankruptcy.

Sir Samuel Romilly and Mr. Bell, in support of the Demurrer.—The first question is, whether a bankrupt can file a Bill against the assignees under the Commission, merely alleging misconduct by them; particularly a Bill of this description; the office copy of which must be very expensive; eighteen years after the bankruptcy, producing no effects: the Bill stating, that no dividend was ever made. If proceedings so vexatious are added to the difficulties, incident to the office of assignee, who can be expected to undertake it? Upon the statment of the Bill neither Plaintiff has any interest whatever. All the interest of a bankrupt in his property is devested, and vests in his assignees so completely, that, while uncertificated, he cannot maintain an action for any property; nor, having obtained his certificate, for any thing, that belonged to him before his bankruptcy.

This is established by several decisions; particularly in *Benfield v. Solomons* (1); different only as it was under circumstances much more favorable to the bankrupt: yet the Demurrer to his Bill by the mortgagees was allowed. On similar grounds the assignees may demur; and also, as the bankrupt may have complete relief

[* 76] by petition in the bankruptcy, he ought not take the more dilatory and expensive proceeding by Bill; admitting, that in many cases a bill may be the more proper course on account of the appeal: but, if no peculiar circumstances call for it, and complete relief may be had by petition, the bankrupt has no option. In *Clarke v. Capron* (2) Lord Rosslyn decided expressly on that ground. The mischievous consequences of such a Bill are pointed out by Lord Avaley in *Spragg v. Binkes* (3). It is now clearly established, that a creditor unless he shows collusion with the executor, cannot maintain a suit against a debtor to the estate: *Elmslie v. Macaulay* (4). *Utterson v. Mair* (5). *Troughton v. Binkes* (6).

(1) *Ante*, vol. ix. 77.

(2) *Ante*, vol. ii. 666.

(3) *Ante*, vol. v. 583; see the note, 587.

(4) 3 Bro. C. C. 624.

(5) *Ante*, vol. ii. 95; 4 Bro. C. C. 270. See the references in the notes, ii. 96; vi. 749, to *Alsager v. Rowley*; *Burroughs v. Elton*, xi. 29.

(6) *Ante*, vol. vi. 573.

This Bill is filed against a person, who can be reached only through the assignee, the responsible officer of the Great Seal; and there is no specific charge of collusion, requiring the interposition of this Court instead of the summary proceeding, prescribed by the Legislature: a remedy, which cannot be had in the case of the executor.

These are the grounds of the Demurrer upon the Record: but there are others, which may be alleged *ore tenus*. The Bill is multifarious; calling for an account against the assignee, under the Act of Insolvency, and under the previous Commission of Bankruptcy, having no connection. The suggestion of collusion between Davis and Long, the assignee under the Insolvent Act, the transactions being perfectly distinct, and relating to different subjects, affords no reason for involving them in the same Bill. It is not suggested, that the other parties had any concern with Long's conduct. Another objection is, * that this Bill, seeking an account [* 77] of the affairs of a bankrupt, does not bring before the Court any assignee: alleging merely the nomination of Pater; but expressly stating, that no assignment was executed.

Mr. Leach and Mr. Peacock, for the Plaintiffs.—The allegation of this Bill is, that the assignees not only did not call Davis to account for his transactions, but permitted him to have the whole management of the bankruptcy; and that by collusion with them he obtained the whole of the property. The objection is taken, that all the objects of this Bill may be obtained by a petition in the bankruptcy; but can the jurisdiction of this Court, upon equitable grounds, be so disposed of? In general experience the habit is to direct a Bill to be filed, if the subject, though otherwise proper for a petition, is so important and complicated, that it is fit that it should be submitted to a jurisdiction, liable to Appeal.

This Bill represents, and distinctly charges, collusion of the assignees with Davis; a series of conduct, tending to abet and aid him in fraudulently acquiring and retaining the property; of which their duty required them to compel an account. Without collusion he could not have obtained it; and the necessary inference is, that all this arose from the permission and negligence of those, who ought to have managed the sales and disposed of the property to the greatest advantage. In a case of this description, a Bill is obviously much more effectual than a Petition, by the discovery, which the assignees will be compelled to make; and on that account the Court in the exercise of its discretion would have directed a Bill to be filed. *Ex parte Barfit* (1), and *Bromley v. Goodere* (2), support the jurisdiction by Bill.

* The case of *Benfield v. Solomons* was the common case [* 78] of a Bill by a bankrupt against a debtor to the estate; which can only be sustained by collusion with the executors, clearly made out. In *Clark v. Capron* (3) the subject was immediately un-

(1) *Ante*, vol. xii. 15.

(2) 1 Atk. 75.

(3) *Ante*, vol. ii. 668.

der the administration in bankruptcy. The question, brought forward by this Bill, is, whether a *Cestui que Trust*, though a bankrupt, has not an interest, that will entitle him to equitable relief against the trustee. There is an express averment of a surplus; which the Bill in *Benfield v. Solomons* had not.

With regard to the objection, that the Bill is multifarious, it is only necessary to make out, as to those parties, to whom that objection is applied, that with reference to some of the demands there is a necessary connection between them: that is not required in all: and, the parol demurrer being as entire as that upon the record, if there is any demand against both Defendants, that will support the Bill against this objection. It is therefore only necessary to show, that some account is sought, in which there is a common interest between the Defendants.

Sir *Samuel Romilly*, in reply.—If this Bill can be maintained, the whole administration of bankruptcy will be transferred to the Court of Chancery; and assignees will be in the situation of trustees in a deed of trust for creditors; against whom a Bill may be filed by any creditor on behalf of himself and all the others. There is no instance of such a Bill, either by a creditor on behalf of himself and all the others, or by a bankrupt, suggesting a surplus. The allegation of this Bill is not that all the creditors have been actually paid, but that

[* 79] Davis became the purchaser of several debts, and property, as suggested, but not * proved, for the benefit of the bankrupt. In *Ex parte Barfit* (1) there was an agreement among the creditors, that the Commission should not proceed farther; that the bankrupt's brother should purchase the whole property; the assignees conveying to him, undertaking to pay all the debts. That was a clear case for specific performance by decree, not for administration in bankruptcy. The case of *Clarke v. Capron* (2) is certainly a questionable decision; and the distinction taken does not appear solid. That however was the case of a single demand. *Benfield v. Solomons* cannot be distinguished. The collusion charged was with the former assignees, not with Pater; to the use of whose name in setting aside these transactions there could be no objection.

The objection to a bill, as multifarious, would be at an end, if the answer could be admitted, that all the parties being concerned in one transaction, all but that may be left out of consideration: but it has been determined in *Ward v. The Duke of Northumberland* (3); where the Defendants, the Duke and Lord Beverley, being clearly concerned in one account, but not in other transactions, the demurrer was allowed.

The Lord CHANCELLOR [ELDON].—This demurrer upon the objection to the bill, as being multifarious, must be allowed clearly. The bill with regard to that is filed under these circumstances. Jones is stated to have become, by the procurement and misconduct

(1) *Ante*, vol. xii. 15.

(2) *Ante*, vol. ii. 666.

(3) In the Court of Exchequer.

of Davis, a bankrupt in 1793 ; upon which bankruptcy a Commission issued, which is now in full force. In 1795 Jones took the benefit of an Act for the relief of Insolvent Debtors ; the consequence of which is, that * the assignee under that [* 80] act has a right to take from the assignees under the Commission whatever surplus might remain after paying the creditors, who proved under the Commission, 20s. in the pound and interest. The two assignees under the Commission are dead ; and the representatives of one are not before the Court : those of the other are ; but not for the purpose of making them answerable for misconduct ; if they were, and that misconduct was common to both assignees, the Bill would want parties : but taking the prayer and charges together, the Bill is not framed with that view. The prayer, which is material in construing charges not direct, as to George, one of the assignees under the Commission, is merely for an account of what he actually received ; and then the Bill, having charged collusion by Long, the assignee under the Insolvent Act, with Davis, prays an account of all Long's dealings ; clearly, though it seeks an account against the personal representatives of George, not charging him with any connection with Long. Seeking to enforce different demands against persons, liable respectively, but not as connected with each other, it is clearly multifarious ; and the Plaintiff cannot bring into the same record the representatives of George and Long but by a case, differently stated from that upon this record. If they could take advantage of this objection by demurrer, Davis may take advantage of it equally ; as another suit might be instituted against him to-morrow.

I should be sorry, however, to decide the case upon that point ; as the other ground of demurrer is much more important. The bankruptcy occurring in 1793, the subsequent proceeding under the Act of Insolvency makes no difference, at least in this respect ; as it is quite settled, that the assignee under that act may apply here by petition under the bankruptcy ; and so may the bankrupt ; notwithstanding the objection, taken to his want of an interest, * entitling him to sue before certificate, it is within [* 81] the jurisdiction in bankruptcy to hear the bankrupt with regard to that, which is acknowledged as an interest, his right to the surplus, if there shall be any (1). As to that, the assignee under the Insolvent Act stands in the place of this bankrupt.

In my view of this bill it does not charge any such collusion as against the assignees under the Commission, who are dead, as would according to a class of cases, with which we are familiar, maintain a bill by a creditor against both the executor and a debtor to the estate upon that species of combination. There is no charge against the representatives of George, the surviving assignee : but the bill simply prays an account against him ; and as to the subsequent choice of Pater, it is expressly alleged, that he has never ac-

(1) *Twogood v. Swanston*, ante, vol. vi. 485.

cepted that trust. Under the bankruptcy therefore, taking the creditors to be paid, or not, there is no one representing the estate as an assignee: but there is not enough upon this record to support the conclusion, that all the creditors are paid: consequently, taking all the charges to be true as against Davis, and distinguishing them, as they affect his acts before and after the bankruptcy, (and as to the latter there is no doubt, that I might relieve upon petition), I am confident in these circumstances, that the assignee, or any creditor, might petition with regard to all acts since the Commission issued; though it is difficult to maintain, that he might not proceed by bill with regard to acts, done before the Commission, unless he had proved a debt under it; and refused to give it up.

No difficulty then standing in the way of a proper assignee, the demurrer is to be considered thus: 1st. Can one creditor file such a bill as this, which must operate as an injunction against [* 82] all proceeding by petition, * without more charge, affecting the existing assignee, if there was one; or, as the case stands upon the record, without an assignee? If such a bill can be filed, I must consider what the Court is to do with regard to the demand under the bankruptcy, as well as under the Insolvent Act. I am not authorised to say, that, though there is now no assignee, there will be none; and I must take into consideration, that, if an assignee should be chosen, he, or any creditor, may petition in the bankruptcy. The jurisdiction in bankruptcy being final, it might perhaps be proper to direct a bill to be filed for the information of the Lord Chancellor, sitting in bankruptcy; just as the Court directs an action, or a case to a Court of Law; but, if I should make an Order upon petition in bankruptcy, pronouncing upon the situation of Davis, and his conduct either before or since the Commission, that Order must either be conclusive and make an end of the suit, or it is a nullity, that cannot be acted upon; and, if one creditor may file such a bill, every creditor may; and the bankrupt himself. In the case of *Bromley v. Goodere* (1) Lord Hardwicke had great difficulty. Unless the right to interest could be raised upon an equity, which he saw in that case, it is extremely difficult to perceive, what jurisdiction the Lord Chancellor had in bankruptcy to order the interest to be paid, attending to the words of the Statute. At all events the bill must be by a creditor on behalf of himself and all the others. If, however, as has been contended for the Plaintiffs, a bill being filed, the Court will make a Decree, as it would have directed a Bill, yet it is clear, that much must be done under the bankruptcy, before any Decree could possibly be made, that would do justice between the two estates, under a Commission or Bankruptcy, and under the Insolvent Act; and upon the [* 83] * circumstances, stated by this record, which for this purpose I must take to be true, I cannot conceive any difficulty in bringing the case on by petition so that relief may be given;

(1) 1 Atk. 75. See 1 Ves. & Bea. 345, *Ex parte Koch*.

and I am apprehensive of making a precedent, an instance of which the Bar cannot furnish.

The Demurrer was allowed. _____

1. This case is likewise reported in 1 Rose, 79.

2. Although the object of a plaintiff may be to establish claims growing out of one general right, yet, when the defendant may justify their several acts upon totally dissimilar grounds, there are cases in which it has been held that separate bills must be filed against each: see, *ante*, note 2 to *Harrison v. Hogg*, 2 V. 323. This rule, however, is at any rate not universal (see *Powell v. Powis*, 1 Younge and Jer. 165); and in *Salvidge v. Hyde*, 5 Mad. 146, it was held by the Vice Chancellor, that, in order to determine whether a suit is multifarious, the inquiry should be, not whether each defendant is connected with every branch of the cause, but whether the bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of a suit be single, though different persons have separate interests in distinct questions arising out of that single object, it was thought to follow necessarily, that such different persons must be brought before the court, in order that the whole subject may be concluded. But, when the same case was brought before the Lord Chancellor by appeal, the demurrer for multifariousness, which the Vice Chancellor had over-ruled, was allowed: see 1 Jacob's Rep. 153. A suit is not multifarious, merely because all the *plaintiffs* are not interested to an equal extent: *Knye v. Moore*, 1 Sim. and Stu. 65: but, where it is attempted to unite in one bill, against several defendants, subjects which are in themselves perfectly distinct, and in which the defendants have not a common interest, this is a frequent ground of demurrer: *Whaley v. Dawson*, 2 Sch. and Lef. 370. And where, of two distinct matters, one requires that the depositions taken in the cause should not be published until the cause is ripe for hearing, but the other requires a previous publication of the very same depositions, these matters must not be joined in one suit, *Dew v. Clarke*, 1 Sim. & Stu. 115; *Shackell v. Macaulay*, 2 Sim. and Stu. 86. Objection to a suit, on the ground of multifariousness, can only be taken by demurrer; it is too late to raise that objection at the hearing of the cause: *Ward v. Cook*, 5 Mad. 122; *Whaley v. Dawson*, 2 Sch. and Lef. 370; *Wynne v. Callender*, 1 Russ. 297.

3. The court will never countenance a proceeding by bill, when the relief sought might be obtained in a shorter and cheaper way by petition in bankruptcy: *Uttersen v. Mair*, 2 Ves. Jun. 98; *Clarke v. Capron*, 2 Ves. Jun. 668: for, where the case involves no serious difficulties, a petition is *festinum remedium*, saving both time and expense: *Ex parte Cowan*, 3 Barn. & Ald. 127: but there are many cases, besides the principal one, in which, from a consideration of the magnitude of the subject or other circumstances, a bill has been directed, though the question might have been disposed of under the jurisdiction in bankruptcy: *Two good v. Swinerton*, 6 Ves. 485; *Ex parte Barfit*, 12 Ves. 16.

GOODIER v. ASHTON.

[ROLLS.—1811, MAY 31.]

DECREE of Foreclosure against an infant, with a day to show cause (a).
(This has been altered since in *Mondey v. Mondey*, 1 Ves. & Bea. 223; directing, in case the mortgagees consent to a sale, an Inquiry, whether it will be for the infant's benefit.)

THE Bill prayed a foreclosure against an infant mortgagor.

Mr. *Hall*, for the Plaintiff, proposed, instead of the usual decree, to take a decree for a sale, as more advantageous to the infant; which was therefore held to be the proper course in *Booth v. Rich* (1), the only instance certainly of such a decree; and though a decree for sale would, as is observed in that case, bind the infant, who would have a day to show cause against a decree for foreclosure, that would only enable him to show error in the decree. The rule in Ireland to direct a sale in all cases instead of a foreclosure does not prevail here.

Mr. *Wetherell*, for the Defendant, said, a sale would [* 84] * certainly be most beneficial to him; as the estate might be mortgaged for less than the value; and suggested the propriety of a reference (2) to the Master, whether it would be for the infant's advantage to accept the Plaintiff's proposal.

THE MASTER OF THE ROLLS [Sir WILLIAM GRANT] said, the modern practice was to foreclose infants; and he would not make the precedent, if no instance could be found, in which the case cited was followed.

The usual Decree was made for a foreclosure with a day to show cause.

SEE note 5 to *Spragg v. Binkes*, 5 V. 583.

(a) An infant may be foreclosed, subject only to error. See, *ante*, note (b) *Winchester v. Beavor*, 3 V. 314. As to the parties to a bill of foreclosure, 4 Kent, Com. (5th ed.) 184-187.

(1) 1 Vern. 295.

(2) This course has been since adopted by the Lord Chancellor; who declared, that he would make a precedent, if there was not one. *Mondey v. Mondey*, 1 Ves. & Bea. 223.

PULVERTOFT v. PULVERTOFT.

[1811, JUNE 27, 28, 29.]

VOLUNTARY settlement void under the stat. 27 Eliz. c. 4, against a subsequent purchaser for valuable consideration with notice, though a fair provision for a wife and children, an Injunction, restraining the husband from selling, was refused: but a Demurrer by the husband over-ruled, as covering too much: the Plaintiff being entitled until a sale to an execution of the trust (a).

Limitation to brothers or other relations within the consideration of a settlement, and therefore not voluntary, [p. 90.]

Purchase-money cannot be laid hold of in favor of claims under a previous settlement void under the stat. 27 Eliz. c. 4, as being voluntary, [p. 91.]

Articles executed against a voluntary settlement, [p. 92.]

Consideration of marriage considered as extending to persons not directly within it; namely, to brothers, uncles, and other relations, upon the marriage of a son; as within the contract between him and his father (b), [p. 92.]

Voluntary settlement good between the parties (c), [p. 92.]

Court of Equity will not act in favor of a mere voluntary settlement; and therefore upon a subsequent purchase with notice and covenant to lay out the money to the same uses, will not lay hold of the money, [p. 93.]

Distinction upon the want of consideration. Upon a contract merely voluntary this Court will do nothing; but takes jurisdiction upon a trust actually created, unless perhaps against a party, having a right to put an end to it by his own act under a sole power of revocation; by analogy to the distinction between the cases, where an entail can be barred by Fine, and where a recovery is necessary (d), [p. 99.]

(a) The Statute of 27 Eliz. c. 4, does not extend to conveyances of personal property, but only to conveyances of real property. *Jones v. Croucher*, 1 Sim. & Stu. 315; 4 Kent, Com. (5th ed.) 463.

After considerable fluctuation of opinion in *England*, it has been decided that voluntary conveyances are void, as to subsequent purchasers, whether with or without notice, although the original conveyance was *bona fide*, and without the slightest admixture of intentional fraud; upon the ground, that the Statute, in every such case, infers fraud, and will not suffer the presumption to be gainsaid. 1 Story, Eq. Jur. § 426; *Doe v. Manning*, 9 East, 58; *Sterry v. Arden*, 1 Johns. Ch. 261, 267 to 271. Mr. Fonblanque has assailed this doctrine. 1 Fonb. b. 1, ch. 1, § 13, note (g).

Mr. Chancellor Kent has held the English doctrine obligatory as the true result of the authorities; but, at the same time, is strongly inclined to the opinion, that, where the purchaser has actual, and not merely constructive notice, it ought not to prevail. *Sterry v. Arden*, 1 Johns. Ch. 261; *S. C.* 12 Johns. 536.

The better American doctrine, sanctioned by the Supreme Court of the United States, seems now to be, that voluntary conveyances of land, *bona fide* made, and not originally fraudulent, are valid against subsequent purchasers. 4 Kent, Com. (5th ed.) 463; *Jackson v. Town*, 4 Cowen, 603; *Ricker v. Ham*, 14 Mass. 139; *Cathcart v. Robinson*, 5 Peters, 280; 1 Story, Eq. Jur. § 427-432.

See farther upon the subject of voluntary conveyances, *ante*, note (b) *Lush v. Wilkinson*, 5 V. 387.

(b) Equity will execute covenants in marriage articles at the instance of any person who is within the influence of the marriage consideration, and in favor of collateral relations, as all such persons rest their claims on the ground of valuable consideration. 2 Kent, Com. (5th ed.) 172, 173.

(c) The Statute does not reach such cases. 1 Story, Eq. Jur. § 425; *Petre v. Espinasse*, 2 Mylne & K. 496; *Bill v. Claxton*, *ib.* 503, 510.

A conveyance made to defraud creditors, though voidable by them, is valid against the grantor and his heirs. *Drinkwater v. Drinkwater*, 4 Mass. 354; *Clapp v. Tirrell*, 20 Pick. 247.

(d) In cases between different volunteers, a Court of Equity will generally not

The distinction between contract and trust with reference to the want of consideration has been acted upon under the same instrument, [p. 99.]

THE Bill, filed by Sarah Pulvertoft, by her next friend, stated her marriage with James Richards Pulvertoft in 1806; and that by indentures of lease and release, dated the 14th and 15th of January, 1807, he conveyed freehold estates to the use of himself for life, without impeachment of waste: with remainder to trustees to preserve contingent remainders; and remainders to his wife [* 85] for life, and for the benefit of their children, and, for default of issue, to himself and his heirs; and by other indentures, dated the 13th and 14th of August, 1807, the settled estates with others were conveyed to Thomas Pulvertoft and his heirs; to secure the sum of 800*l.*, advanced by him by way of mortgage; and, subject thereto, for the separate use of Sarah Pulvertoft; with remainder to the use of James Richards Pulvertoft for life; remainder to trustees to preserve contingent remainders; and, as to the estates in the former settlement, after the decease of the survivor and in the event of no children to the right heirs of the survivor; and as to the other estates to the children of James Richards Pulvertoft in tail, with remainder, subject to his appointment by Will, to the right heirs of the survivor of him and his wife. In June, 1808, another settlement was executed; by which the limitations to the wife and children were not varied.

The Bill farther stated, that the mortgage was afterwards paid to Thomas Pulvertoft; and he and the other trustees being desirous to be discharged from the trusts, another settlement was executed in June, 1810; conveying the estates to other trustees, upon the same trusts for the sole and separate use of Sarah Pulvertoft, and after her decease, upon such uses and trusts for the benefit of James Richards Pulvertoft and Sarah Pulvertoft, and their issue, if any, and the survivor of him and her, his or her heirs, &c. as were declared by the former settlements.

The Bill, charging, that as against James Richards Pulvertoft the

interfere, but will leave the parties, where it finds them, as to title. It will not aid one against another; neither will it enforce a voluntary contract. 1 Story, Eq. Jur. § 433, note.

Nor will it enforce a mere gratuitous gift or moral obligation. It is no matter, if the consideration be meritorious, or if the parties, seeking the intervention of the Court, stand in relation of a wife or child. See *ante*, note (a) *Ellison v. Ellison*, 6 V. 656; 2 Story, Eq. Jur. § 706a, 793a, 987.

“Lord Eldon in *Ellison v. Ellison*, 6 V. 622, has stated the general doctrine in Equity to be, that voluntary trust, executed by a conveyance, will be held valid, and enforced in Equity. But if the trust is executory, and rests merely in covenant, it will not be executed. The exception in favor of meritorious claimants, such as a wife or children, is admitted by the same learned judge, in *Pulvertoft v. Pulvertoft*, 18 V. 99. Mr. Chancellor Kent in *Bunn v. Winthrop*, 1 Johns. Ch. 336, has examined many of the cases, and has adopted Lord Eldon’s conclusion. With respect to chattel interests, he maintains, that an agreement under a seal imports a consideration at law; and that, therefore, a bond, though voluntary and without consideration, will support a decree for executing the trust.” 2 Story, Eq. Jur. § 987, note; see also, *Minturn v. Seymour*, 4 Johns. Ch. 500.

settlement was good, that he was not indebted at the time of the execution of the deeds respectively, and that he was about to sell the estate, prayed, that the trusts of the several indentures of 1807, * 1808, and 1810, may be established, and carried [* 86] into execution, &c. ; that the Defendant James Richards Pulvertoft may be restrained from selling, charging or incumbering the estates, and that a receiver may be appointed. An Injunction having been obtained, a Motion was made to dissolve it.

Mr. *Leach* and Mr. *Wakefield*, in support of the Motion to dissolve the Injunction.—The case of *Exelby v. Templar* (1) is a decision according to the rule of Equity, and the principle, from which it springs ; that a conveyance, taken against conscience, with notice of the defect, must be held subject to the same conscientious claim. When therefore it is decided, that a purchaser is not affected by notice of claims under a voluntary settlement, as it is not against conscience for the purchaser to take, it cannot be against conscience for the vendor to sell. The effect of that case is, that a voluntary conveyance has no value in contemplation of Equity ; and *Parry v. Carwarden* (2) is another case, leading to the same conclusion. The consequence is, that a Court of Equity will not interpose for the protection of any interest under a voluntary settlement, to execute articles, or give any aid to persons claiming under a voluntary settlement, so as to prevent, a sale by the author of it.

Sir *Samuel Romilly* and Mr. *Haslewood*, for the Plaintiff.—A Court of Equity will prevent a man, having made such a voluntary settlement upon his wife and children, from disappointing it. In the cases cited an actual sale * had taken place ; and the [* 87] contest was between an actual purchaser and those, who claimed under the voluntary conveyance : but the question here is, whether this Court will give to a person, who has now no Equity, an Equity against the wife and children ; whether the husband and father shall be enabled to create such an interest in some person for the mere purpose of disappointing the settlement. The objection, that, if the purchase is not against conscience, the sale cannot be unconscientious, is answered by the Act of Parliament (3) positively declaring a voluntary conveyance void against a purchaser ; not therefore involving any question of conscience. Here is no person, who has a right to call for the benefit of that Statute. It is surely a most unconscientious act in a man, having settled an estate upon his wife and children, to sell, and take the money himself ; though it may not be unconscientious to propose to purchase, if a good title can be made.

There are many instances of a good consideration supported and aided in Equity. *Villers v. Beaumont* (4). *Brookbank v. Brook-*

(1) 2 Bro. C. C. 148.

(2) 2 Dick. 544.

(3) Stat. 27 Eliz. c. 4.

(4) 1 Vern. 100.

bank, (1). The tendency of the modern cases is, that the decisions upon this Statute have gone sufficiently far; and their defect in defeating such settlements is not to be extended: *Doe, on the Demise of Watson v. Rouledge* (2). *Roe on the Demise of Hamerton v. Mitton* (3). The right to dower, or a jointure given up, has been held a valuable interest, preventing the effect of this Statute; and the Court does not enter into the *quantum* of the consideration: *Scott v. Bell* (4). *Lavender v. Blackstone* (5). In *Ellis* [* 88] *v. Ellis* (6), * and *Roberts v. Roberts* (7) the husband was restrained from assigning the wife's property, thereby defeating her right to a settlement. A contract would be enforced in favor of a wife and children; but the jurisdiction becomes nugatory, if the husband, by creating an interest in a third person, can defeat his own act. Admitting, that the right of a third person, claiming either by conveyance or contract the benefit of this Statute, would prevail, the question is whether a Court of Equity will permit the husband to create such an interest, which does not yet exist, and thus defeat the act, by which he had discharged the moral obligation to provide for his family. The consequence of dissolving the Injunction in this stage of the cause must be a decision against the relief under this settlement without a possibility of appeal: a consideration, which will induce the Court to admit a short delay by continuing the injunction until the hearing.

Mr. *Leach*, in reply.—The observations upon these Statutes, and the distinctions with reference to the nature of the settlement, as merely voluntary, upon good consideration, or fraudulent, and the object, as affecting creditors, or purchasers, have been made in all times; and are to be found in many cases; which are collected, and fully considered in *Doe, on the Demise of Otley v. Manning* (8): but the construction * upon the latter statute,

(1) 1 Eq. Ca. Ab. 168.

(2) Cowp. 705.

(3) 2 Wils. 356. See, *ante*, vol. ii. 410, in *Middleton v. Lord Kenyon*.

(4) 2 Lev. 70.

(5) 2 Lev. 146.

(6) 1 Sup. Vin. 475.

(7) 1 Sup. Vin. 476.

(8) 9 East, 59; *Hill v. The Bishop of Exeter*, 2 Taunt. 69. The Courts, conceiving the weight of authority to be in favor of the conclusion, that a settlement, merely voluntary, without actual fraud, is void against a purchaser, have expressed regret, that it has been extended to a purchaser with notice: a conclusion, that seems equally inconsistent with the letter and spirit of the Act, and with reason. Perhaps, as a general presumption in favor of a purchaser without notice, the inference of a fraudulent purpose of subsequent sale may not be unreasonable, open however to the effect of time and other circumstances; and may be sufficient to meet the observation upon the penal clause, and the exception of conveyances for good consideration and *bona fide*; if upon the context that is to be construed other than valuable: see 3 Co. 83; Cro. Eliz. 446: but an attempt to defeat a fair family settlement is a fraud, of another description, and upon other parties, than those the Statute points at; and a purchaser with notice, joining in such a design, can hardly be represented as the person free from imputation, "*for the intent and of purpose to defraud and deceive*" whom the act was done. See the case, put by

which must be the same at Law and in Equity, is now settled ; that all conveyances merely voluntary are void against a subsequent purchaser for valuable consideration. Upon that well-established rule your Lordship will not again throw a doubt by sustaining this injunction ; attending to Lord Thurlow's observation in *Evelyn v. Templar* (1), that so many titles stand upon this rule, that it cannot be shaken. That case was decided upon a principle conclusive as to this : the purchaser having notice of the claim ; who, if the vendor has no right to sell on account of that claim, must be equally affected : as he can never take advantage of a fraud, to which he is a party. The plain consequence of this settled rule of construction is, that notwithstanding a voluntary conveyance the grantor has a right to sell the estate, as if he had expressly reserved that right. All the authorities may be reconciled upon that principle ; and there is no other way of reconciling them. Every person must be taken to know, that by law he has that power ; * and therefore it is unnecessary to reserve it. The case [* 90] of *Parry v. Carwarden* (2) leads to the same conclusion ; that the grantor in a conveyance merely voluntary, has still a right to sell ; and a purchaser by articles under such circumstances that a Court of Equity will give them effect is equally a purchaser in Equity as he would have been by conveyance at law. The case of *Holford v. Holford* (3) confirms that proposition, that a Court of Equity will entertain a suit for the performance of a contract by articles against claims under a voluntary conveyance : an issue being directed, to determine, whether the Defendant was a person claiming under a conveyance, fraudulent according to the construction of the Statute, the conclusion is, that if he proved to be so, the contract would be executed against him : but it was not executed, as the Jury found, that the conveyance was not void under the Statute. The cases upon the wife's property and her right in Equity to a settlement have no application to this subject.

The Lord CHANCELLOR [ELDON].—The object of that inquiry in *Holford v. Holford* was to ascertain, whether the brother of the father was under the first settlement a mere volunteer ; as, where the limitation extends to brothers, or other relations, all within the consideration, those are not cases of voluntary settlement.

It is too late to dispute, that, if a settlement, though for good consideration, is voluntary, as between the persons, claiming under it, and a purchaser, though with notice, the purchaser will hold the estate. It is true the construction, put upon both these Statutes, is singular ; that a man, paying, what in other cases is called * an obligation of nature, should be considered as within [* 91] the penalties of these Acts. I remember, I think, all the

Anderson, Ch. J. 3 Co. 83 ; *Twyne's Case*, Cro. Eliz. 445. This Statute does not apply to personal property. *Jones v. Croucher*, 1 Sim. & Stu. 315.

(1) 2 Bro. C. C. 148.

(2) 2 Dick. 544.

(3) 1 Ch. Ca. 216.

cases that have occurred in the Courts of Justice for the last thirty years upon this point: I have also had considerable information from others, carrying my acquaintance with it back to the distance of half a century; and after granting this Injunction, I felt extremely uneasy; as having taken a step, that I believe was never before asked from a Court of Justice: recollecting also the struggle of late against the doctrine upon the construction of these Statutes, and Lord Thurlow's opinion on the case (1), I argued, that the money could not be laid hold of, it seems almost impossible to conceive, that, if Courts of Equity had this jurisdiction, there would not have been found considerable authority, leaving no doubt upon it at this day.

I have not had an opportunity of looking through the cases so thoroughly as I wish: but upon examining the case of *Evelyn v. Templar* in my own book I find the printed note very imperfect; and I believe this very point was much discussed there. In *Leach v. Dean* (2), which was referred to in that case, it does appear from another very imperfect Report, that this Court did lay hold of the money, and I stated that to Lord Thurlow, as a ground for his interposition in a case, much stronger than the common case, an actual covenant, that, if he did sell, he would settle the money to the same uses; and in all these cases, whether there should be such covenants, or not, there are, generally, covenants for the title, upon which the value of the estate might be recovered at law: but there are many cases of that kind, where, if purely voluntary, this Court would not do any thing upon such a covenant.

[* 92] * The case of *Holford v. Holford* (3) I dare not rely upon without looking more into it. If it was a decision, that this Court will not execute articles against a voluntary settlement, it contradicts a much later case, in *Dickens* (4), and others, where this Court has executed articles against a voluntary settlement. For another reason also I would not decide upon that case without examining the Register's Book, on account of the case of persons, not within the consideration directly; but who have been always so considered; preventing the effect of these statutes. In the case, for instance, of a father, tenant for life, with remainder to his son in tail, they may agree upon the marriage of the son to settle, not only upon his issue, but upon the brothers and uncles of that son; and the question would be, whether they, though not within the consideration of the marriage, are not within the contract between the father and son: both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations; and to say to each other, "I will not agree unless you will so settle." The Court has held such a claim not to be that of a mere volunteer:

(1) 2 Bro. C. C. 148.

(2) 1 Ch. Rep. 78.

(3) 1 Ch. Ca. 216.

(4) *Parry v. Carwarden*, 2 Dick. 544. It was said, that from the Register's Book it appears, that the Court directed the money to be laid out upon the trusts of the settlement; and it was afterwards compromised.

but, as falling within the range of the consideration ; and therefore these Statutes would not bear upon it (1).

The case of *Brookbank v. Brookbank* (2) bears much upon the point. It is clear, that a voluntary settlement is good between the parties. I wish also to look at that case in the Register's Book. If it was no more than a voluntary settlement by the father and son, and upon * failure of issue the father wished to part with the estate, and the uncle filed a Bill to have the deed brought into Court, first, I doubt extremely, whether the uncle would be entitled to that ; as the son himself would not have been entitled to have the deed brought into Court. Next, I cannot agree, that, if the deed had been brought into Court, it would have prevented a sale by the father, if that was a voluntary settlement. The answer would be, that the deed, though brought into Court, being no more, the purchaser, getting the prior title deeds, would have been safe. [* 93]

With regard to the cases (3) cited as to the wife's property, it is now very well understood, that the doctrine, resulting out of those cases, will not apply to such a case as this ; and many of them would not at this day be held to be law, as applying to her property : but, if Lord Thurlow did not think himself authorised to lay hold of the money in *Evelyn v. Templar*, where there was notice, and an express covenant to lay out the money to the same uses, I must take his opinion to have been, as I believe it was, that with a mere voluntary settlement this Court has nothing to do.

Another circumstance has been suggested ; that this is not a voluntary settlement, with reference to the wife giving up her dower. With regard to the fact, estates are so involved with trusts, that in very few cases is the wife entitled to dower. That however may be the subject of inquiry : but upon the general point my opinion is, that I ought not to have granted this Injunction ; and I was extremely uneasy afterwards reflecting upon it.

The Order was made dissolving the Injunction.

1811, June 29th. The Lord CHANCELLOR [ELDON].— [* 94]
I have read the settlement in this case ; and desire it to be understood, that I give no opinion whatsoever, whether this settlement was, or was not, voluntary ; being apprehensive, that, refusing the injunction I should be considered as intimating an opinion, that the purchaser would have a good title. If this is a voluntary settlement, I cannot grant the injunction. If it is not a voluntary settlement, I cannot for that mere reason grant the injunction ; as the effect would be, that any person, who conceived himself to have a better title than another, might come into this Court for an injunc-

(1) *Sutton v. Lord Chetwynd*, 3 Mer. 249, and the note, 254 ; *ante*, vol. ii. 410, and the note.

(2) 1 Eq. Ca. Ab. 168.

(3) *Ellis v. Ellis*, *Roberts v. Roberts*, 1 Sup. Vin. 475, 6. See, *post*, 96, n.

tion. I cannot therefore support the injunction whether the settlement is voluntary, or not; but I intimate no opinion, whether the purchaser will have a good title, or not (1).

The Injunction being dissolved, the Defendant put in a Demurrer. *Nov. 19th.* Mr. *Leach* and Mr. *Wakefield*, in support of the Demurrer, referred to the former argument, and the late case of *Otley v. Manning* (2), collecting all the authorities; and observed, that this was merely a re-hearing of the Order dissolving the Injunction.

Sir *Samuel Romilly*, and Mr. *Haslewood*, for the Plaintiff.—The case of *Otley v. Manning* has no application. A clear equity appears upon the face of this bill, derived from the last settlement; under which the estate now stands limited, first, to the separate use of the wife for life; with remainders to the husband for [* 95] life, and * to the children; and the bill is filed against the husband and the trustees; alleging, that he is about to sell the estate, but also praying, that the trusts may be established. No doubt can be suggested upon the jurisdiction in a Court of Equity, until he has by a sale made a conveyance to another person for valuable consideration. Until that is actually done, the wife has a clear right to have it secured for her benefit. Admitting this to be a voluntary conveyance, to which a Court of Equity will not give any assistance, the question is, whether the Court will restrain the husband from revoking it by conveying to another person for valuable consideration. The opinion, which the Court has expressed, that he may do so, gives the Statute of Elizabeth an effect, which it has never yet had: though as against a purchaser for valuable consideration, even with notice, it is admitted, that the most meritorious voluntary settlement is void. The result of *Otley v. Manning*, in which case all the authorities were considered, and their force compared, is, that the object of the Legislature was to make such a settlement void in all cases against a purchaser on account of the inconvenience, attending the question of notice; leaving him at liberty to revoke the conveyance he had made: but the intention to protect purchasers did not extend to denying assistance to parties, claiming under a settlement upon good, meritorious, though not valuable, consideration.

The principle, upon which the determinations at law upon this Statute have gone, being, that it is not safe or convenient to leave the right to fluctuate upon the point of notice, considering the effect of deciding in equity against the interests under the settlement, where no person except the husband stands in competition with them, Courts of Equity have so far followed the law as to consider [* 96] a person, contracting for the purchase of an * estate without notice of a voluntary settlement, as if he had

(1) *Smith v. Garland*, 2 Mer. 123.

(2) 9 East, 59.

a conveyance; giving him therefore a specific performance: but there is no instance of aiding a husband to undo a voluntary settlement, made without fraud; and Mr. Sugden in his excellent work notices a decision (1) by the present Master of the Rolls, refusing to the husband a specific performance of such a contract. If the Court will not give the husband assistance to undo a settlement, it is but one step farther to restrain him from entering into a contract, which may be the means of revoking it. In *Colman v. Sarrel* (2) Lord Thurlow took the distinction, that a voluntary deed, upon a meritorious consideration, as a provision for a wife or child, shall be executed. If therefore this rested in articles, the wife would have had a specific performance against her husband; and a necessary consequence is, that the Court, enforcing the contract, will take care, that it shall be executed effectually against him in her favor.

There are other cases, having analogy to this: *Ellis v. Ellis* (3); a decision of Lord Loughborough, upon the bill of a married woman, *restraining her husband from assigning her [* 97] *Chose in Action*, a legacy, as she would have been deprived of her right to a settlement: the Law not being at that time understood, as it has been since settled (4), that the assignee would be equally liable to her Equity. In *Roberts v. Roberts* (5) a similar Injunction was granted by Lord Alvanley, sitting for the Lord Chancellor: expressing a strong opinion that the assignee also would be compelled to make a settlement: and that this is not new doctrine appears from *Winch v. Page* (6). The principle, on which these cases were decided, that the Equity against the husband would have been lost by the assignment, has direct application. At this moment no one has any interest against this settlement except the husband; and the Statute certainly was not made for his protection, or to give him the right to revoke the settlement.

Mr. Leach, in reply.—After the decisions, that have taken place, the Court cannot with any consistency interpose against the husband's right of alienation. The case of *Ellis v. Ellis* turned upon its particular circumstances: the wife entitled to stock, vested in the

(1) *Burke v. Dawson*, at the Rolls, March, 1805, Sugden's Law of Vendors and Purchasers of Estates, 439, 2d edit.; 5th edit. 569.

(2) 3 Bro. C. C. 12; *ante*, vol. i. 50.

(3) 1 Sup. Vin. 475; 6th March, 1794, cited from a manuscript note by Mr. Abbott, Speaker of the House of Commons.

The Plaintiff, a married woman, entitled to money in the funds, filed the Bill to restrain her husband from assigning, and to compel him to make a settlement.

Mr. Scott, for the Plaintiff, said, that the Court would restrain the Act, which would have the effect of destroying the Plaintiff's equity against her husband, which would not prevail against his assignee; and it is not true, that the Court will interpose only where the husband comes into Equity; as it will against his suit in the Ecclesiastical Court; citing Tothill. (See *Mealis v. Mealis*, *ante*, vol. v. 517, note.) Lord Loughborough, C., continued the Injunction; and directed the husband to lay a proposal before the Master.

(4) *Ante*, *Wright v. Morley*, vol. xi. 12, the references, and the note vol. ii. 609.

(5) In Chancery, 1796, 1 Sup. Vin. 476.

(6) Bunb. 86.

name of the trustee, and the husband about to alien, it was conceived, that the assignee would take discharged from the obligation, * to which the husband's claim was liable. That [* 98] erroneous conclusion has since been corrected; and was in truth an anomaly; as the assignee, taking with notice of the equitable obligation, must take subject to that obligation; which the husband could not be permitted to annul by transferring to a third person. Generally a person, claiming as a volunteer, cannot have assistance from a Court of Equity; and there is no instance, in which the Court has acted upon the distinction, collected from Lord Thurlow's words in *Colman v. Sarrel*, by enforcing a voluntary agreement even for a wife or child. The language does not necessarily lead to that conclusion: perhaps the Lord Chancellor might have intended circumstances, that would amount to valuable consideration: as an agreement before marriage; which is the more probable from coupling it with a clear case of valuable consideration, viz. the payment of debts. At all events Lord Thurlow cannot be presumed from those general words to have established a new rule upon a subject of so much importance.

The Injunction therefore has been properly refused: the Plaintiff has no more right to the assistance of the Court by the appointment of a receiver; and the whole subject of equitable jurisdiction failing, the demurrer must be allowed.

The Lord CHANCELLOR [ELDON].—Upon the principal question I am ready to give my opinion; but I will not prejudice the case by expressing it, if the Demurrer is at last to be over-ruled upon another ground. The question is not, as it is now put, whether if there is a contract for a wife or children, this Court would execute that contract, as being for a meritorious consideration: but it [* 99] must be * considered as not resting in contract, but a trust, for consideration meritorious, or otherwise, by an actual estate in trustees; and the distinction is settled, that in the case of a contract, merely voluntary, (I do not speak of valuable or meritorious consideration) this Court will do nothing: but, if it does not rest in voluntary agreement, but an actual trust is created, the Court does take jurisdiction; and in one case, I do not recollect, whether it was *Colman v. Sarrel* (1), as far as the obligation rested in the covenant of the husband, the Court would not do any thing: but in the very same case, as far as an actual transfer had been made, the Court acted upon it: a direct trust being created (2). Suppose, this settlement to the separate use of the wife had given an express power of revocation to the husband, having in his own dominion the means of putting an end to it the moment it was acted upon: perhaps in such a case, as in case of a *quasi* estate-tail of renewable leases for lives, the Court would not interfere: but here there is no power of revocation by his own act: there must be the concurrence

(1) 3 Bro. C. C. 12; *ante*, vol. i. 60.

(2) *Post*, 149.

of others. Suppose, trustees were incapable of acting; that there was an infant heir: it is difficult to maintain, that, though an estate and trust were actually created, this Court would stop on the ground that the estate might at some period be destroyed by a conveyance for valuable consideration. So, as to a receiver, this Court would not refuse a receiver, though there may be a prior estate actually existing, without prejudice to the right of the person, having that prior estate: but, where there is no prior estate, and perhaps no preferable estate may ever exist, will the Court stop short in executing the trust? If the trustees could maintain an ejectment at Law this Court must give the parties, claiming under the trust, the remedies, to * which they are entitled, while that es- [* 100] tate exists. The distinction, to which I am now advert- ing, resembles that, which is acknowledged by this Court between the cases, where a party can bar by fine, and where he is obliged to go through the form of a recovery.

This point appears to me to be one of considerable weight; and therefore, though I have formed an opinion upon the other question, I shall refrain from expressing it, unless I shall find myself justified by the necessity of determining that question.

The Lord CHANCELLOR [ELDON] afterwards upon the point last suggested over-ruled the Demurrer, as covering too much: the Plaintiff until an actual sale being entitled to an execution of the trust. His Lordship did not express any farther opinion on the other question (1).

1. A court of equity will take no notice of a contract merely voluntary, and which remains *in fieri*: see, *ante*, note 2 to *Colman v. Sarrell*, 1 V. 50.

2. A marriage settlement, containing limitations in favor of collateral relations, will not, as far as they are concerned, be supported by the sole consideration of the marriage: but there may be other considerations rendering their claims very different from those of mere volunteers, and taking the limitations in their favor out of the statutes both of the 13th and the 27th of Eliz.: see note 4 to *Nairn v. Prowse*, 6 V. 752; and see notes 1, 2, 3, to the same just-cited case, that there may be circumstances which will support even a post-nuptial settlement, not only against creditors, but against purchasers for valuable consideration.

3. Against a purchaser, a settlement, purely voluntary, cannot stand; but the party who made the settlement ought not to disturb it. As against himself it is valid and binding. A court of equity remains neutral with respect to it. It will not impede a sale by which he wishes to get rid of it, but neither will it assist him to effect that purpose. The purchaser may claim the benefit of the statute of 27th Eliz. c. IV.; but, as between the settlor and the objects of the settlement, it is perfectly binding: *Smith v. Garland*, 2 Meriv. 127; and see note 3 to *Curtis v. Price*, 12 V. 89.

4. The purchaser of the estate in question in this suit, in 1813, on a bill filed against the party claiming under the voluntary settlement, before answer, obtained an order for a receiver: see *Metcalf v. Pulvertoft*, 1 Ves. & Beat. 180-184: to that bill, a plea in bar was afterwards put in, pleading that the plaintiff had purchased the estate *pendente lite*; but the plea was overruled: see 2 Ves. & Beat. 200-208.

(1) *Buckle v. Mitchell*, the following case.

BUCKLE v. MITCHELL.

[ROLLS.—1812, FEB. 17; MARCH.]

VOLUNTARY settlement, though free from actual fraud, and meritorious, as a provision for relations, void against a subsequent purchaser for valuable consideration, with notice, whether by conveyance, or articles (a).

Specific performance decreed in the latter case.

Equitable discretion to lend or refuse aid to execute a contract for purchase not arbitrary (b), [p. 111.]

Notice of the contents of a voluntary settlement has no effect even in Equity: therefore notice of a covenant in a voluntary settlement, that the purchase-money should be paid to trustees, to be laid out in other lands, to be settled to the same uses, held immaterial, [p. 112.]

No Equity under a voluntary settlement to prevent a sale, [p. 112.]

THOMAS PEACE, seised in fee of the impropriate rectory of Rogate subject to an outstanding mortgage for the term of one thousand years, by indentures of lease and release, dated the [* 101] 9th and 10th of September, * 1793, in consideration of the natural love and affection which he had for his sister Mary Gardner and for her children Ann Stevens, Frank Gardner, and Harriet Gardner, and in consideration of ten shillings, granted the rectory to Sibthorpe and Daintry in fee, subject to the payment of any money, then due on any mortgage of the premises, and to all the specialty and simple-contract debts then due, or to be due, from the said Thomas Peace, in trust for the said Thomas Peace for life, and after his death, in case Harriet Gardner should survive him, to raise by sale or mortgage 500*l.* for Harriet Gardner; with a *proviso*, that she should not have that sum, unless she should relinquish and give up to Frank Gardner her distributive share in the personal estate of Thomas Peace; and, subject as aforesaid, in trust for Frank Gardner for life, without impeachment of waste; then to secure to any woman, whom he might leave his widow, an annuity of 40*l.* for life; with remainder in trust for the children of Frank Gardner for such estate as he should appoint, and in default of appointment for all his children, as tenants in common in fee; and, if he should die without leaving any issue, in trust for Thomas Peace, his heirs and assigns; with a power to Thomas Peace, and after his death for Frank Gardner, to sell for the purpose of discharging any mortgage or other incumbrance upon the premises; and a *proviso*, that no sale or mortgage should be made for the purpose of raising the 500*l.*, if Frank Gardner, his heirs, executors, or administrators, or the heirs, executors, or administrators of Thomas Peace, should within twelve months after his death pay Harriet Gardner 500*l.* On the fourth of October, 1794, 2678*l.*, the amount due on the mortgage, was paid to

(a) See *ante*, notes (a) (b) (c) and (d), to preceding case.

(b) Specific performance is a matter of discretion, not arbitrary, but judicial. See *ante*, note. See *ante*, note (b) *White v. Damon*, 7 V. 30; notes, *Omerod v. Hardman*, 5 V. 723.

Mary White, the assignee of the mortgage term, by Sibthorpe and Daintry, by direction of Thomas Peace with his money; and the term was assigned to Andrews, in trust for *Peace, [* 102] and to attend the inheritance. In 1794 Frank Gardner married Elizabeth Winter: and had children by her F. T. Gardner, E. M. Gardner, and L. S. Gardner. Harriet Gardner married Mitchell. Daintry died on the 26th June, 1810. By agreement in writing, signed by Peace, and by Andrews on behalf of Buckle, in consideration of 500*l.*, paid down, and of 6500*l.* to be paid, Peace agreed to convey to Buckle the tithes of divers lands, part of the rectorial tithes; and it was declared, that, if it should be impracticable to part with the title-deeds by reason of the trusts of a settlement, voluntarily made by Thomas Peace, affecting the tithes agreed to be sold and other hereditaments, then Buckle should at the expense of Peace accept attested copies with a covenant to produce originals. Thomas Peace died on the 28th of June, 1810, intestate, leaving Frank Gardner his heir-at-law: who died on the 28th of July, 1810, intestate, leaving his wife and children surviving.

Harriet Mitchell took out administration to Peace. Buckle filed this bill against Mitchell and his wife, Sibthorpe, the Gardners, and Andrews, for a specific performance of the agreement, and for repayment of his deposit, if the agreement could not be performed.

Sir *Samuel Romilly* and Mr. *Courtenay*, for the Plaintiffs; Mr. *Hart*, and Mr. *Daniel*, for the Defendants Mitchell and his wife.—The question is, whether after a pure voluntary settlement, in favor of near relations, void by the Statute (1) of Elizabeth, against a purchaser with or without notice, a contract for sale can be enforced against the parties, claiming as volunteers under that settlement. Though doubts * have been at some periods entertained, no question can now be made as to the construction of this Statute; that if after a voluntary settlement, though for what is called meritorious consideration, upon a wife and children, the settlor for a valuable consideration conveys to a person, having full knowledge of that settlement, and that the principal object of the contract and conveyance to him is the destruction of the settlement, as against that person the settlement is altogether void. That has been clearly decided by the Court of King's Bench in a very recent case (2.)

The question in this case goes beyond that; whether, no actual conveyance being executed, a Court of Equity will enforce the execution of it against the parties, having the legal estate under the prior voluntary settlement. Upon that subject there is no direct authority: but it received much consideration by the Lord Chancellor in a late case, *Pulvertoft v. Pulvertoft* (3); the injunction, which was granted in the first instance to a wife claiming under a voluntary

(1) Stat. 27 Eliz. c. 4.

(2) Doe on the demise of *Olley v. Manning*, 9 East, 59; *Hill v. The Bishop of Exeter*, 2 Taunt. 69.

(3) *Ante*, the preceding case. See the references.

settlement, restraining her husband from selling, being dissolved before answer: the Court holding, that the wife had no equity to interpose against the husband's power of disposition; and the argument, that, though an actual conveyance for valuable consideration would destroy the settlement, it had been decided, that the purchaser not having obtained it, could not have assistance in this Court to enforce the contract, had no weight against the Defendant, the husband, contending, that there was no distinction upon this Statute between Law and Equity; that the effect of the contract in equity was precisely the same as that of the conveyance at law.

[* 104] *The Lord Chancellor was on that occasion reminded of the cases of a husband, restrained from assigning his wife's *Chose in Action*, to prevent his defeating her equitable right to a provision, before it was decided, that an assignee for valuable consideration is bound equally with the husband to make a provision for her.

The Statute does not require an actual conveyance to bring a party within the description of a purchaser for valuable consideration, to defeat a voluntary settlement. From these articles it appears, that all the parties had the settlement in view, as not standing in the way. In *Leach v. Dean* (1) it does not appear, that there was direct notice: but that is a distinct decision, that a person under these circumstances is a purchaser within the Statute. In *Douglasse v. Waad* (2) the jointress had no legal remedy; and the Court interfered in favor of her right against a settlement upon the most meritorious consideration, but in law voluntary. This Plaintiff is not attempting to take the legal estate out of any one; but insists upon a superior equity. In this Court the contract upon valuable consideration has all the effect, which an actual conveyance would have at law; passing all the interest in equity. It is evident upon the face of this settlement, that the parties contemplated the case of a sale to take place of it; giving a power of sale for the purpose of discharging any mortgage or other incumbrance; and the settlement being subject to the debts, not only then due, but also to such as he should at any time during his life contract. They also contemplated the sum of 500*l.* for Harriet Gardner as one of the incumbrances, for which the estate might be sold.

[* 105] *Mr. *Leach* and Mr. *Roupell*, for the other Defendants, claiming under the voluntary settlement.—This settlement was made by a man, unmarried, having no children, subject to the payment of his debts, upon himself, for life; and after his death for his sister's children; and the question is, whether a Court of Equity will compel the trustees for those persons to convey. The application is to the discretion of the Court; which cannot be complied with, unless the contract, under which the Plaintiff claims, is under all the circumstances, upon principles of moral obligation, such as

(1) 1 Ch. Rep. 78.

(2) 1 Ch. Ca. 99.

ought to be enforced; entitling the party, beyond his legal remedy against the assets, to the extraordinary, specific, relief, to be obtained by the interposition of this Court. A conveyance for these near relations is certainly upon good consideration; but that term, as used in this Statute, has been held to mean valuable. A provident disposition of this sort for the benefit of a family, clear of fraud, undue influence, or surprise, is regarded in law as binding the grantor in every Court; placing the property, which is the subject of it, out of his reach, and liable to no change of intention. Is a Court of Equity to be active against such claims, not for the purpose of relieving a purchaser, or a stranger, whose interests can in no other way be protected, but for one, who, rejecting the full indemnity, which the law affords, insists without any reason, that the person, who made this provident settlement, is bound in conscience to rob his family of the benefit he had conferred on them? If this particular case has not yet occurred, a Court of Equity will not make a precedent, so offensive to its maxims. The construction of the Statute, extending to cases, not fraudulent, is necessary; or the object must be defeated: which was to check the evil, that after a voluntary conveyance, passing the estate, a sale took place; and after the death of the vendor the purchaser was affected. In a Court of Law it was difficult to establish strictly the intention to defraud; which was therefore assumed in favor * of purchasers; and [* 106] that principle, that a voluntary conveyance was void against a purchaser, being established at law, was followed in Equity. In *Leach v. Dean* the father, with whom the purchaser made the contract, could not set up against his own agreement a conveyance, made expressly to defraud that purchaser. The distinction was taken between the party making, and those taking, under a voluntary conveyance. The former was considered as between him and the purchaser to have made it with the intention to deceive; the others cannot upon any construction be affected by fraud. The clear distinction between the cases is, that constructive evidence, which at law prevails against the party, making the contract, is not in Equity to be extended to those, who claim under it. The purchaser cannot in Equity, and against such parties, say the object was to deceive him. A Court of Equity will not push the construction of this Statute farther than is necessary; and the objection is, that an adequate remedy may be had at law.

In the case of *Douglasse v. Waad* (1) the second wife was a purchaser of the 300*l.* per annum, not only by the portion, but also by the act of marriage; a consideration, which could not be recalled. The nature of the consideration prevented its return. She was consequently a purchaser, whose title was to be sustained against a volunteer. In *Pulvertoft v. Pulvertoft* (2) the Lord Chancellor refused to interfere to prevent the husband's act: but that case is no

(1) 1 Ch. Ca. 99.

(2) The preceding case.

authority in favor of the purchaser. A Court of Equity has no jurisdiction to set up that, which the Statute has in positive terms declared absolutely void: but under circumstances, to which the Statute does not apply, how can these parties be reached in equity?

This Bill does not assert, that the sale was under the [* 107] * power, to pay off an incumbrance; but the object appears to have been to sell the whole, and put the money in his own pocket: an act inapplicable to that power; and calculated merely to defeat this settlement, made many years before, and standing upon not only meritorious, but valuable consideration. The original object of the act to relieve purchasers, deceived by fraud, has certainly been extended to conveyances merely voluntary on account of the difficulty of getting at the facts, and establishing the charge of fraud: but such settlements are never considered as simply void: being always established as good between the parties, until creditors or purchasers appear. This Plaintiff, having entered into an executory contract, with notice, has no stronger claim than a mere volunteer. The jurisdiction is wholly discretionary; depending upon the superior equity; as either case has, or wants, fraud, circumvention, surprise, inadequacy; the circumstances, influencing the Court to grant a specific performance, or to refuse it, leaving the party to law. In *Leach v. Dean* the want of notice is not alleged: which in this instance does not rest upon presumption, but is established by the direct reference in the contract to the settlement under the apprehension, that they could not obtain the title-deeds; which were in the possession of the trustees. So in *Douglasse v. Waad* nothing is said about notice. *Pulvertoft v. Pulvertoft* was under different circumstances: not a purchaser coming for the aid of the Court against a voluntary settlement; but the party claiming under that settlement to restrain the husband from doing what he might do by law; for which purpose the Court refused to interpose; leaving the result of their contracts and rights to the determination of the law. Notice is of the utmost importance. *White v.*

[* 108] *Hussey* (1) turned * upon the absence of notice; and it is relied on by Lord Mansfield in *Doe on the demise of Watson v. Routledge* (2). In *Bennet v. Musgrove* Lord Hardwicke expresses himself strongly upon the distinction between actual and presumed fraud; that in the former case a purchaser for valuable consideration may in this Court set aside a precedent voluntary conveyance; but in the latter would be left to law.

Sir *Samuel Romilly* in reply.—The true question is, whether the Statute shall have a different operation in Equity from that, which it has at Law. The Plaintiff, having a contract, which cannot be disputed, has from the moment it is signed an equitable interest. This discretionary power to grant a specific performance has never been thus limited on the ground, that there is a complete remedy at law:

(1) Pre. Ch. 13.

(2) Cowp. 705.

but a specific performance may be compelled even of a contract for half the value ; as was said particularly in *Mortlock v. Buller* (1) ; unless nearly approaching to fraud ; in which case the Court has remained neuter. The construction of this Statute as to notice was very questionable originally ; and perhaps, had the consequences been foreseen, the Act would not have passed. In many instances, instead of preventing, it creates fraud ; depriving persons of estates, to which for years they have been permitted to suppose themselves entitled, and to arrange their plans in life accordingly. It is however too late now to remedy that except by an Act of Parliament, declaring, that against a purchaser with notice such a settlement shall not be void ; which would perhaps be a very wise provision. Every argument applies equally to a person, having an agreement, as a conveyance : otherwise the * conclusion [*109] must be, that the construction is different at Law and in Equity. *Leach v. Dean*, has no distinction, except that it is not ascertained, whether the party had notice ; which can never be material in the case of an executory contract. A person, claiming as a volunteer under another, is in Equity precisely in the same situation as the party under whom he claims, liable to every objection and equity. *Douglasse v. Waad*, also, cannot be distinguished. It is said, upon that case, that she could not be unmarried : but the Court has never gone upon that distinction, whether the one party had or had not, the means of repaying the other ; who might lose by not carrying the agreement into execution. There must be some general rule, depending upon the construction of the Act, not the possibility of getting back the purchase-money. In *Pulvertoft v. Pulvertoft*, the point decided was not the same ; but went much farther, and could not have been determined, as it was, unless the Lord Chancellor conceived, that the Court ought to give the relief, prayed by this Bill ; depending upon the right of the husband, if he pleases, to undo that, which he has done ; to act upon the estate by sale, as if he remained absolute owner. If the Court would not in that case interfere by Injunction to prevent the destruction of the settlement, is not the person, contracting with him as such absolute owner, entitled to have the contract carried into execution ? The Lord Chancellor cited from a manuscript note the case, in which the Court refused to compel the husband, having, after a voluntary settlement, contracted to sell, to settle the purchase-money to the same uses ; conceiving that there was no Equity to affect the purchase-money, after the estate was sold. In *Burke v. Dawson* (2), the Court would not compel the * execution of a contract by a [*110] husband, having made a voluntary settlement, against the purchaser. *Parry v. Carwarden* (3), and *Oxleigh v. Lee* (4), are not directly applicable, from the want of notice.

(1) *Ante*, vol. x. 292.

(2) At the Rolls, March 1805. Sugd. Law of Vendors and Purchasers, 439 ; 5th ed. 569.

(3) 2 Dick. 544.

(4) 1 Atk. 625.

1813. *March*. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The objection to the specific performance, prayed for by the Bill, is made by those, who claim interests under the voluntary settlement, executed by the vendor of the estate.

It must, I conceive, be assumed, that the Statute of the 27th of Elizabeth has now received this construction; that a voluntary settlement, however free from actual fraud, is, by the operation of that Statute, deemed fraudulent and void against a subsequent purchaser for a valuable consideration, even when the purchase has been made with notice of the prior voluntary settlement. I have great difficulty to persuade myself, that the words of the Statute warranted, or that the purpose of it required such a construction: for it is not easy to conceive, how a purchaser can be defrauded by a settlement, of which he has notice, before he makes his purchase. But it is essential to the security of property, that the rule should be adhered to, when settled; whatever doubt there may be as to the grounds, on which it originally stood. The Statute must receive the same construction, and produce the same effect, in a Court of Equity, as in a Court of Law. The purchaser of an equitable estate for a valuable consideration, ought no more to be affected by a voluntary settlement than the purchaser of a legal estate. A contract [* 111] for a purchase is an equitable title; * and the party, having such title, is in Equity to most purposes considered as the complete owner of the estate. It is true, that Equity does not in every case lend its aid to carry a contract for a purchase into execution: but it does not arbitrarily execute one contract, and refuse to execute another. Some ground must be laid to prevent the party from obtaining, in his case, the assistance which the Court usually gives in cases of the same general description (1).

Then the question is, whether the existence of a prior voluntary settlement be a sufficient ground to induce a Court of Equity to refuse to complete a contract in favor of a party, who has notice of such settlement? If a settlement were shown to be really fraudulent, in the ordinary acceptance of the word, I presume it would not be contended, that the Court would, out of regard to such settlement, refuse to give to a party, purchasing with notice of it, the benefit of his contract: but it is said, that voluntary settlements are often made upon laudable and meritorious considerations; and that a Court of Equity ought not to be instrumental in defeating such as are of that description. But is not this an assumption, which the Statute, according to the construction it has received, does not permit us to make? Considering the party, contracting for a purchase, as in Equity a purchaser, the Statute, as construed, says, that the settlement, set up against him, is merely a fraudulent device to cheat and impose upon subsequent purchasers. Is the Court to say, that because of that fraudulent device it will refuse to act in favor of a purchaser, who stands in need of its interposition? The Statute,

(1) *Anle*, vol. vii. 35, and the notes, v. 734, 849.

as it has been construed, says, that a purchaser, who has notice of a voluntary settlement, has notice not of a title, but of a nullity and a fraud. How then can a Court of Equity say, that it is unconscientious in a person, having such * notice, to enter [* 112] into a treaty for a purchase, when it is bound to say, that there is nothing unconscientious in his taking a conveyance of the estate? In *Evelyn v. Templar* (1) the circumstance of the purchaser's having notice of a covenant in a voluntary settlement, that the purchase-money should be paid to trustees to be laid out in other lands, to be settled to the same uses, was held to be immaterial. As it is clear, that he would have been affected by notice of such a covenant in a deed for a valuable consideration, the case proves, that in Lord Thurlow's opinion notice of the contents of a voluntary settlement has no effect even in a Court of Equity.

In *Pulvertoft v. Pulvertoft* the present Lord Chancellor has held, that even before any third person has acquired an interest in the property, voluntarily settled, and when the matter rests entirely between the grantor or grantee, the latter has no Equity to prevent the former from defeating the grant by a sale of the estate. It would be a strong thing then to say, that he has an Equity after the estate is contracted for, and after a third person has acquired an interest in it, to prevent that third person from obtaining the benefit of the contract, which the Court would not restrain the settlor himself from entering into.

The case of *Leach v. Dean* is a very material one; and seems to be a direct decision on the point. It is true, no mention is made of the purchaser's having had notice of the voluntary settlement, before he entered into the agreement; but, in the first place, it being now settled, that according to the true construction of the Statute a voluntary settlement, of which a purchaser has notice, is as against him just as fraudulent as one, of which he has no notice, the difference seems to be immaterial. * In the second [* 113] place, the purchaser had notice, before he had either paid his purchase-money, or got his conveyance. If notice were material, it came in sufficient time: yet the Court with full knowledge of the settlement went on, and executed the contract. The same observation applies to *Parry v. Carwarden*, where only 10*l.* of the purchase-money had been paid, before the voluntary settlement was set up. It was said in the argument, that in *Leach v. Dean*, the settlor was before the Court; and he could not avoid the performance of the contract, by setting up his own voluntary deed: but the settlor's being before the Court, could not at all affect the case of the son, who was also before it. It was necessary to decide, whether his interest under the settlement should prevent the Court from decreeing a specific performance against the father. Accordingly the Court first considers, how the case stood with respect to the father; and secondly, with respect to the son: and decided,

that the case of the son was not distinguishable *quoad hoc* from that of the father; which was deciding, that the grantee in a voluntary settlement has no more right than the grantor to object to the completion of a contract for the sale of the settled estate.

I shall conclude with observing, that as in this case the legal estate is in trustees, the question comes to be, which party has the best right to call for a conveyance of it. For the reasons I have already given, I think it is the purchaser; and therefore the decree must be in his favor.

As to Mrs. Gardner's annuity, it is said to be for a valuable consideration: but if there be any valid incumbrances on the estate, a Decree for a specific performance will not at all affect them.

THAT a voluntary settlement cannot stand against a subsequent purchase for valuable consideration, see the notes to the last preceding case; and that the discretion which a court of equity reserves to itself, to lend or refuse its aid to enforce execution of a purchase contract, is not an arbitrary discretion, see, *ante*, note 1 to *Brodie v. St. Paul*, 1 V. 326.

[* 114]

ERSKINE v. GARTHSHORE.

[1811, JUNE 27.]

ANY proceeding may be referred for Scandal and Impertinence; as a state of facts before the Master, and Affidavits in Bankruptcy (a).

A MOTION was made to refer for scandal and impertinence a state of facts, laid before the Master.

Sir *Samuel Romilly* and Mr. *Bell*, in support of the Motion, referring to *Coffin v. Cooper* (1), contended, that a state of facts is as open to this Reference as any other proceeding.

Mr. *Hart*, against the Motion.—This is a proceeding required by the Master merely for his own satisfaction upon a point, which the party is to maintain; it may be received, or not, according to the Master's discretion: the interposition of the Court is therefore unnecessary; as the Master is competent to control any abuse. No instance is produced; and such a precedent will produce much inconvenience. There is a wide distinction between a state of facts, brought into the Master's Office, and a pleading; which ought to contain no reasoning; as a state of facts may; the Office of which is to apprise the Master of all the facts and the nature of the case.

Sir *Samuel Romilly*, in reply, observed, that, if the Master re-

(a) Any unnecessary allegation bearing cruelly upon the moral character of an individual, is scandalous; 1 Barb. Ch. Pr. 41. Nothing pertinent to a cause is scandalous; Story, Eq. Pl. § 269.

As to exceptions for impertinence, see *ante*, notes (a) and (b) *Pellaw v. —*, 6 V. 456.

(1) *Ante*, vol. vi. 514.

jected the state of facts, the party would have no remedy for the expense of taking a copy; and insisted, that there is no rational distinction between this and any other proceeding, affected by *scandal and impertinence; for instance, affidavits in [* 115] bankruptcy (1).

The Lord CHANCELLOR [ELDON].—I have had occasion formerly to look into this subject, not with reference to this particular proceeding, but upon affidavits in bankruptcy, and I am perfectly satisfied, that there can be no one proceeding before this Court, which, if made the vehicle of scandal and impertinence, this Court will not examine with the view to reform it. A state of facts, carried in before the Master, is in truth carried in before the Court; of which the Master's Office is part: it contains all the points, supposed to be put in issue, to be proved before the Master; and are persons under that color to be libelled without the least reference to the subject of the suit?

The Order was made.

SEE note 1 to *The Anonymous case*, 5 V. 656; and note 1 to *Coffin v. Cooper*, 6 V. 514.

HOLTZAPFFEL v BAKER.

[1811, JUNE 20; JULY 1.]

No Equity in favor of a lessee of a house, liable to repair with the exception of damage by fire, for an Injunction against an Action under the contract for payment of rent upon the destruction of the house by fire (a).

By an agreement, signed by the Plaintiff and the Defendant, and dated 31st May, 1803, the Defendant agreed to let to the Plaintiff a messuage and workshops, and premises, in Long Acre, for nine years and an half, at the yearly rent of 70*l.* payable quarterly, * on the usual days; and the Plaintiff agreed to [* 116] take the said messuage and premises upon those terms, and "to pay the yearly rent thereby reserved on the days and times and in manner before mentioned." The Plaintiff also agreed to repair the premises, and keep them in repair, reasonable use and wear and damage by fire excepted. The rent was regularly paid to Michaelmas, 1809. On the 15th January, 1810, the premises were totally consumed by fire, and reduced to a state of ruin, so that the Plaintiff had been since entirely deprived of the occupation and use of them.

The Defendant having brought an action against the Plaintiff

(1) *Ante*, *Ex parte Simpson*, vol. xv. 476. So in *Lunacy*, *Ex parte Le Heup*, *post*, 221; see *ante*, vol. v. 656, and the note.

(a) See *ante*, note (b) *Pym v. Blackburn*, 3 V. 34; 1 Story, Eq. Jur. § 102.

for a year and a half's rent, from Michaelmas, 1809, to Lady-day, 1811, the Plaintiff filed his Bill, praying, that the Defendant might rebuild the premises, and for an injunction against proceedings at Law for recovering rent from Christmas, 1809, until the premises should be rebuilt; or that the Defendant might accept a surrender of the agreement, and in that case, for an injunction against recovering rent from Christmas, 1809; the Plaintiff in the latter case, offering to surrender the agreement and all his estate and interest therein; and in both cases, offering to pay the quarter's rent from Michaelmas, 1809, to the Christmas following. The Plaintiff having obtained an Injunction against the action, for want of an answer, the Defendant on the coming in of the answer, moved to dissolve the injunction.

The action was tried, before the motion was disposed of; and the landlord obtained a verdict.

Mr. *Richards*, and Mr. *Roupell*, in support of the Motion [* 117] to dissolve the Injunction.—* In the case of *Hare v.*

Grove (1) *Brown v. Quilter* (2) and all the preceding authorities were reviewed; and upon full consideration the Court of Exchequer decided, that as there was no defence against an action, so the tenant has no remedy in equity against the effect of the substantive, independent, covenant to pay the rent during the term. *Brown v. Quilter* does not decide the point; though certainly Lord Northington expressed his opinion, that, the covenant for quiet enjoyment, though it did not oblige the landlord to rebuild, afforded a ground for an injunction, until the house was rebuilt. The landlord had insured; and had actually received the amount of that insurance; which might perhaps be considered as affecting his conscience, and taking the case out of the general rule. In this instance there was no insurance; and, the equity being equal, as the Chief Baron observes, the rule of law must prevail. There is no distinction between this and the case in the Court of Exchequer, which is the last decision, and never contradicted, except the circumstance of the dangerous use, to which in that instance the house was applied; a circumstance, which the Court considered immaterial.

Sir *Samuel Romilly* and Mr. *Treslove*, for the Plaintiff.—That case certainly very much resembles this; but it is a single decision of the Court of Exchequer against three in this Court; and the reasoning is not very satisfactory. Some points of distinction however may be observed. This is, not a lease under seal, with a distinct covenant for the rent, but an agreement to let for nine years and an half from the preceding Lady-day at the yearly rent of 70*l.*; and the tenant agreeing to take the premises, and pay the rent, must [* 118] be understood as *undertaking that, having the enjoyment of the premises. This equity is supported by three

(1) 3 Anstr. 687.

(2) Amb. 619.

authorities, two by Lord Northington, and one by Lord Bathurst. *Brown v. Quilter* certainly is not a decision: the tenant, refusing to give up the lease, not being entitled to relief; but Lord Northington expresses a clear opinion in the tenant's favor. In *Camden v. Morton* (1) Lord Northington adhered to that opinion; representing it as most unreasonable and unconscientious, that the lessor should be paid for a house, the only subject of the demise, where the lessee is prevented by the accident of the fire from enjoying it. Lord Apsley clearly decided this point in the tenant's favor in *Steele v. Wright* (2). As to the distinction, where the landlord insured, and received the value, it is extremely difficult to conceive, how that distinct contract, merely for the advantage of the lessor, with which the lessee has no concern, can affect the right as between them. It is manifestly against conscience, that the rent, stipulated for with reference to the tenant's enjoyment, which is the consideration for it, the tenant also expressly stipulating, that he shall not be bound to rebuild, should be demanded under these circumstances. In *Brown v. Quilter* there was land demised with the house; but the house is the only subject of this demise; and the parties, looking to that alone, the limitation of the covenant to repair by the exception of damage by fire may be considered as extending throughout the contract. The Lord Chief Baron treats Lord Northington's opinion, comparing the effect of this accident to an eviction, as unsound. The effect of giving this relief will be to divide the burthen; either *com- [* 119] pelling the landlord to rebuild, or letting the tenant give up the lease.

The Lord CHANCELLOR [ELDON].—Some of the fire-offices reserve the option of paying the money, or laying it out themselves; which may make a considerable difference; as that option ought not to affect the lessee.

For the Plaintiff.—That option is reserved merely for their own protection against fraud; not for the benefit of the tenant.

Mr. *Richards*, in reply.—At law there is no doubt; and where is the equity? This is the contract of the parties. If it can be compared to eviction, there is a defence at law. If the premises were destroyed by the overflowing of a river, that was held by Lord Northington not to raise an equity, Lord Northington's distinction has no solid foundation; and the last case is a very solemn decision upon a review of all the authorities and the principles.

The Lord CHANCELLOR [ELDON].—After so solemn a determination of this question, upon a hearing, the Court ought to abide by it; and really I cannot perceive the equity in this sort of case. Suppose a demise for seven years, at a rent of 100*l.* per annum, the tenant to repair in all cases except fire, not to be liable in that case, and the landlord stipulating, that in case of fire he will be content at the end

(1) Before Lord Northington. Cited from a ms. of Serjeant Hill in the library of Lincoln's Inn.

(2) Cited 1 Term. Rep. 708, in *Doe v. Sandham*, as decided by Lord Apsley, in 1773.

of seven years to take the land without the house ; if they choose to make that agreement, why should they not ? These parties [* 120] have made that agreement. If it can * be maintained, that the meaning of this contract is, that, if a fire should happen, the rent shall not be paid, there is no occasion to come into equity : but, if that is not the effect of the contract at law, I cannot see any equity.

The Injunction was dissolved.

1. A TENANT may be exempted, by one covenant of his lease, from responsibility in respect of any damage which may be done to the demised premises by fire ; but this will not protect him against a separate and independent covenant for payment of rent during the term ; see, *ante*, note 2 to *Pym v. Blackburn*, 3 V. 34.
2. The proceedings in the principal case at common law are reported in 4 Taunt. 45.

WOOD v. DOWNES.

[1811, JULY 1, 2, AND SEVERAL PRECEDING DAYS.]

BENEFICIAL contracts and conveyances, obtained by an attorney from his client during their relation, as such, and connected with the subject of the suit, being also liable to the charge of *Champerty*, decreed to stand as a security only for what was actually due ; and purchases by the attorney declared a trust (a). A subsequent deed, not a separate, independent, voluntary, transaction, but under the same pressure, and called for under the covenant for farther assurance, no confirmation.

Maintenance and *Champerty* (b), [p. 125.]

Attorney cannot take any thing from his client for his own benefit pending the suit, but his demand ; nor a guardian from his ward pending the guardianship nor at its close, nor until the relation and influence have ceased in either case (c), [p. 126.]

Bond set aside as, though not strictly *Champerty*, near it, [p. 128.]

HERBERT HOWARTH died in 1745 ; having devised his estates, subject to his debts, to his three sisters, as tenants in common in fee. The Plaintiff, Frances Wood, his great niece, by a son of one of those sisters, was his heir at law.

(a) Where a deed is only constructively fraudulent, Chancery will direct it to stand as a security for the sum really due. *Boyd v. Dunlap*, 1 Johns. Ch. 482 ; *Bernal v. Donegal*, 1 Bligh, N. S. 594 : S. C. 3 Dow, 133 ; *Boynton v. Hubbard*, 7 Mass. 120 ; 1 Sugden, Vend. & Purch. (6th Am. ed.) c. 6, § 1, art. 56, p. 333, [463] ; *Gwynne v. Heaton*, 1 Bro. C. C. 11 ; 1 Story, Eq. Jur. § 344 ; Jeremy, Eq. Jur. 487 ; 1 Maddock, Ch. Pr. 331. It is otherwise with deeds void on the ground of clear fraud ; *Sands v. Codriss*, 4 Johns. 536 ; *Boyd v. Dunlap*, 1 Johns. Ch. 482.

(b) What are Maintenance and *Champerty*, and the policy of the law against them, see *ante*, note (a) *Wallis v. Portland*, 3 V. 494.

(c) See *ante*, note (a) *Newman v. Payne*, 2 V. 199 ; 1 Story, Eq. Jur. § 310. As to the jealousy with which Courts of Equity regard transactions of this nature, see 1 Metcalf & Perkins, Dig. Att. and Client, viii. pl. 369, *et seq.* ; *Rose v. Mynott*, 7 Yerger, 30 ; *Berrien v. Mc Lane*, 1 Hoff. Ch. 421 ; *Wheelan v. Wheelan*, 3 Cowen,

The Bill, filed by William Wood and Frances, his wife, claiming in her right as heiress at law and devisee, prayed, that the several contracts, deeds, &c., executed by the Plaintiff William Wood and Frances, his wife, to the Defendant, of any right or interest, belonging to them in the Whitehouse estate, or other property of Herbert Howarth, which purported to be an absolute sale or conveyance of any such right or interest to the Defendant, may be declared fraudulent as against the Plaintiff; and may stand as security only for any sums * that may appear to be due on a general ac- [* 121] count; and that the purchase made, and conveyances taken, from George Pardoe and Somerset Davis may be declared to have been taken in trust for the Plaintiff; that an account may be taken of all sums, paid and advanced by the Defendant to the Plaintiff, and also of sums expended by, or justly due to, the Defendant, for fees, or otherwise, as attorney and solicitor, and of the sums, paid to Pardoe and Davis, with interest; on account of the rents received, and the produce of timber sold; and a reconveyance.

The Bill charged, that the Plaintiffs were deceived by the Defendant; that the conveyances were obtained by his influence and control, while acting as their attorney and solicitor; that they were not acquainted with their * rights, the nature and value of the estate, &c.; that representations were made by the Defendant, that there was great doubt, whether the Plaintiffs could recover the estate; that the price he gave was inadequate, and an arbitration was made under his control and management; that no attorney was employed on behalf of the Plaintiffs in the purchase by the Defendant; that his purchases from Pardoe and Davis were made on behalf of the Plaintiffs; that Pardoe's principal inducement was the Plaintiffs' release of demands upon him; and Davis's inducement was, that the right of the Plaintiffs would prevent his making his security available; and the Defendant represented to them, that the purchases were made on behalf of the Plaintiffs.

The answer represented, that the Plaintiff, William Wood, being under great anxiety, and very unwilling to embark at his own risk in the tedious, expensive, and uncertain, litigation, necessary for enforcing his wife's claims, the agreement took place between him and the * Defendant in October, 1789, contained in [* 122] the instrument of that date: reciting, that the Plaintiff had applied to the Defendant to prosecute the suits; to which he consented: but, as the subject was extensive and confused, and likely to be attended with great difficulty and expense, which the Plaintiff was not in a situation to advance, &c.

The answer farther stated, that afterwards, in 1790, upon advice, that such an agreement would be illegal, they came to an agreement for a sale to the Defendant in consideration of 100*l.* then paid, and

537; *Starr v. Vanderkeyden*, 9 Johns. 253; *Mills v. Irvin*, 1 M'Cord, ch. 524; note (a) *Whichcote v. Lawrence*, 3 V. 740.

Equity is watchful of all transactions growing out of an abuse of confidence; see *ante*, notes, *Huguenin v. Baseley*, 13 V. 105.

1000*l.* to be paid, as after mentioned, of the Plaintiff's one third of the estate ; and the conveyance was executed, and a fine levied accordingly. Another conveyance was executed, dated the 23d and 24th of December, 1791, after a recovery in ejectment in right of the Plaintiff, and possession taken under it, upon a suggestion of doubts of the validity of the former conveyance and fine, the Plaintiff not having then recovered possession, in consideration of the sum of 1100*l.* formerly paid.

The answer denied the several charges in the Bill as to the purchases from Pardoe and Davis, and the alleged imposition, inadequacy, &c. ; that the Defendant had any particular knowledge of the estate, that was not equally possessed by the Plaintiff ; that the Defendant, though employed as the Plaintiff's solicitor in making inquiries relative to the title prior to January, 1790, acted as solicitor at the execution of the deeds ; insisting, that the Plaintiff had full knowledge ; and the contracts were perfectly fair, &c.

July 2d. The Lord CHANCELLOR [ELDON], after a most minute statement of the facts of this case, pronounced the following judgment.

[* 123] * This is a case of great importance with reference to persons, standing in the relation of attorney and client (1). Taking the first of these instruments either as an agreement, entered into with the Defendant, a solicitor, applied to carry on the suit upon the part of the Plaintiff, and assuming, as I may infer, that this deed would give the Defendant a benefit of some amount regarding it as an agreement executed between attorney and client, it could not have stood in a Court of Equity : it could not be enforced ; and farther, upon the doctrine of Champerty. and the cases upon buying pretended titles, if the Defendant had not been the attorney, it would be quite impossible, that a Court of Equity could permit this deed to have any effect. It is an instrument equally inoperative both at Law and in Equity : no covenant, contained in it, could be executed ; and, whatever effect it might have by way of Estoppel, it could have none by transmutation of interest on both grounds ; as being liable to imputation for Champerty, and also as a deed obtained from a client by an attorney, beginning to carry on those suits, the effect of which was to be the consideration for this instrument.

The subsequent deed, of 1791, which is relied on as a confirmation, clearly cannot have that effect. If the principles of a Court of Equity, not only with reference to the law of Maintenance and *Champerty*, but also as arising out of the relation of attorney and client, would not have permitted the original transaction to stand, this subsequent deed cannot have the effect of doing away all the objections. The Defendant is bound to an admission, that the deed of 1791 was

(1) *Ante*, *Gibson v. Jeyes*, vol. vi. 266 : see the notes, 280 ; ii. 204 ; *Montesquieu v. Sandys*, *post*, 302.

called for by him under the pressure of an obligation, which he had a right to call upon the Plaintiff and his wife to fulfil ; and the deed recites * that he had called on them to fulfil [* 124] their covenant for farther assurance ; under which that deed was executed. This deed, purporting upon the face of it to have been executed expressly at the instance of the Defendant in discharge of a covenant, which is not binding on the ground of *Champerty*, or the relation of attorney and client, must be taken to have been executed in consequence of a covenant, having no binding effect in equity ; and is therefore no confirmation.

The dates, with reference to the subsequent transactions, are extremely material ; and the circumstances, under which the residue of the 1000*l.* was paid. Taking the situation of the Plaintiff and his wife, before any instrument was executed by him, to be such as it is represented to be by the answer, confirmed by the representation in several of the instruments, it was one, for a suitor to be placed in, of as much difficulty, as doubtful with regard to the probable surplus, and as burthensome in point of expense, as can be conceived. He was upon the representation of the Defendant himself not only placed under all those difficulties, attending the obligations resulting out of the articles of 1787, and the agreements of 1789 and 1790, when the Defendant became the purchaser, but he had not the means of successfully struggling with those difficulties. He had at least by the advice of his Solicitor fallen into a situation, in which his original difficulties were enhanced with all the additional difficulties, resulting from an obligation, conceived by himself and others to be ineffectual, but never admitted to be so by the Defendant ; always on the contrary representing the points, to which the Plaintiff's attention had been drawn, as too absurd to be insisted on ; the difficulties from a fine levied by his wife, attending the question, whether it was to operate by *estoppel*, or not, and from the deed of 1791 ; * which the Defendant cannot represent as an in- [* 125] dependent, detached, voluntary, transaction. His mouth is closed as to that ; reciting, that he called for it : and called for it in discharge of the obligation, arising out of the covenant for farther assurance ; which he represents himself entitled to, and determined to have.

I have observed, that this case appears to me as to be regarded in two points of view : the transaction liable to objections of two kinds : first, as bringing forward the consideration of the effect of a bargain between an attorney and his client, for the benefit of the attorney, before, pending, and after, a suit ; and not only for his benefit, but connected with the very article and subject in contest in a suit, in which he was about to be engaged. The objection therefore is, not merely that, which flows out of the relation of attorney and client, but beyond that, if not cured by a distinct, separate, detached, transaction, after all the circumstances and every objection were known and understood, upon the fact that this was the purchase of

a title in litigation, with reference to the law of Maintenance and *Champerty*.

The authorities, which it is necessary to cite upon this occasion, applicable to that objection, I take from Hawkins's text ; whose references fully establish the doctrine he delivers. As to maintenance, he (1) states, that it has been said, no one can be guilty of it in respect of any money, given to another, before any suit is actually commenced ; yet if it plainly appear, that it was given merely with a design to assist him in the prosecution or defence of an intended suit, which afterwards is actually brought, surely it is as great a misdemeanor in the nature of the thing, and equally criminal at [* 126] Common * Law, as if the money were given after the commencement of the suit ; though perhaps it may not in strictness come under the notion of maintenance.

Another passage (2) is material ; stating *Champerty* to be the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it ; and by Statute (3) it is enacted, that no person for to have part of the thing in plea shall take upon him the business, that is in suit.

The Year Book, 13 Hen. VII. 17, is referred to (4) for this doctrine ; that, though the giving part of the land in suit after the end of it to a counsellor for his wages is not within the meaning of the Act, if it evidently appears, that there was no kind of precedent bargain relating to such gift, it seems dangerous to meddle with any such gift ; since it cannot but carry with it a strong presumption of *Champerty*.

Lord Northington, relieving against a bargain of this sort, gives the reason in these words, that it savors of *Champerty*, or carries a strong presumption of it.

The cases in print, that have reference to this subject, are, *Proof v. Hinds* (5). *Walmesley v. Booth* (6). *Drapers' Company v. Davis* (7). *Oldham v. Hand* (8). *Newman v. Paine* (9). In *Hyl-*

[* 127] *ton v. Hylton* (10) it is * laid down as clear Law, that no attorney can take any thing for his own benefit from his client pending the suit, save his demand ; and I add, that as a guardian cannot take any thing from his ward pending the guardianship, or at the close of it, or at any period, until his influence has ceased to exist, the obligation upon an attorney to refrain from taking an extraordinary benefit is at least as strong.

(1) 1 Hawk. P. C. 537.

(2) 1 Hawk. P. C. 545.

(3) Stat. 28 Edw. III. c. 11.

(4) 1 Hawk. P. C. 548.

(5) For. 1.

(6) 2 Atk. 25.

(7) 2 Atk. 295.

(8) 2 Ves. 259.

(9) *Ante*, vol. ii. 199.

(10) 2 Ves. 547 ; *Hatch v. Hatch*, *ante*, vol. ix. 292.

The case of *Wells v. Middleton* (1) is an extremely strong case of this kind. It was admitted, that the transaction was liable to no objection as between man and man : but it was overturned upon this great principle, the danger from the influence of Attorneys or Counsel over clients, while having the care of their property ; and, whatever mischief may arise in particular cases, the Law, with the view of preventing public mischief, says, they shall take no benefit, derived under such circumstances. It is not denied in any case, that, if the relation has completely ceased, if the influence can be rationally supposed also to cease, a client may be generous to his Attorney or Counsel, as to any other person : but it must go so far.

In a case in 1767, not in print, *Strachan v. Brandon* (2), the Plaintiff, by descent a Swede, but born in England, claimed as heir of a Swede a large estate : being in indigent circumstances he applied to Willis, an attorney ; who agreed to undertake his cause, if a fund could be procured. A subscription was proposed ; and Willis became one of the subscribers upon these terms ; that the Plaintiff, if he succeeded, should pay the subscribers, and among them Willis, double the sums advanced ; and if he failed, the subscribers were to lose their money. A * bond was [* 128] given with a penalty of 4000*l.* ; and 1000*l.* was advanced. That case was before Lord Northington ; who decreed, that the bond could not be permitted to stand as a security for more than the 1000*l.* actually advanced ; stating in his Decree, that, this transaction, though not strictly Champerty, was so near, that it could not be permitted to prevail ; declaring, that it savors of Champerty ; and is therefore dangerous to public Justice (3).

That has been since followed. If such is the doctrine, let us examine this case. Upon the question, whether these can be represented as bargains, made by the Defendant with the Plaintiff for the Plaintiff's benefit, I cannot be supposed to err in stating, that the Defendant may fairly be regarded in purchasing his client's title upon these, or any, terms as not meaning to purchase for his client's benefit. Next, this is really Champerty ; and it is impossible to deny, that it savors of it. Then as to the confirmation by the deed of December, 1791, it is impossible to declare that to be such a confirmation, in the sense of that word, that the transaction is now to be regarded as free from objection. This is not a separate, detached, transaction ; but was called for professedly under the force, pressure, and influence, of the prior transaction ; and this passed, when it is impossible to represent the Plaintiff as a free agent ; when he was laboring under all the pressure, belonging to his situation, independent of these transactions ; his difficulties aggravated, as they were, by the effect of those transactions. This purchase therefore could not possibly have stood in 1791.

(1) Cited *ante*, vol. ix. 294 ; xii. 372 ; xiii. 52, 138.

(2) Since published, in 1 Eden, 303.

(3) See *ante*, vol. iii. 502 ; *Stevens v. Bagwell*,¹ xv. 139 ; *Hartley v. Russell*, 2 Sim. & Stu. 244.

The next question is, whether the Defendant can hold for his own benefit the purchase he made from Davis: that is, [* 129] *whether an attorney, employed to recover this third part of an estate, can by availing himself of his situation, and acting upon the opportunity of bargaining for the purchase of a mortgage, which the client would have had, stating, that the purchase was for the client himself, admitting, that upon the doctrine of Equity it was, not for his own, but for his client's, benefit, turn round upon his client; and insist upon holding the mortgage in this instance, not only for 630*l.*, but for 1100*l.* It is a most difficult point to maintain, if the purchase of the Plaintiff's third of this estate cannot stand, that the Defendant may set his foot upon that, to enable him to stretch forward to a mortgage; and in that shape claim a charge of 1100*l.*, having made the purchase for 600*l.* The Plaintiff therefore must be entitled to redeem that mortgage on payment of the sum of 630*l.* and interest; the same terms, upon which Davis would be entitled.

There is a question beyond that, of rather more difficulty; whether the Defendant, having actually purchased the interest of Pardoe, such as it was, and having afterwards recovered the third of the estate, if he must give up the original third, is bound also to give up a moiety of the third he purchased from Pardoe. I have had much difficulty upon that: but my conclusion is, that he is bound to give up that also; taking it under such circumstances, that he must be considered a purchaser for the Plaintiff's benefit, if the original transaction as to the Plaintiff's own third cannot stand; and it is too dangerous to permit these written declarations of trust to be done away by the answer of the Defendant, contradicting them, and stating, that he has betaken himself to a situation, in which he is obliged to exhibit these, as appearances merely to evade the administration of justice. The Defendant, therefore, being [* 130] a trustee for the Plaintiff of *the original third, and the interest in Davis's mortgage, is also a trustee of a moiety of the third purchased from Pardoe.

Then, as to the acquiescence from 1791, why should that produce another effect? Is the Plaintiff at this moment delivered from the difficulties, in which he was involved in 1791? He is in exactly the same situation of difficulty and embarrassment as he was at that period.

Upon those grounds, after a very anxious consideration of this case, my opinion is, that the Plaintiff is entitled to relief against this Defendant to the extent I have stated; and it follows, that, giving the Plaintiff relief upon these principles, I must give it to him with his costs of suit.

The Decree declared, that the agreement of the 24th of October, 1789, and the 27th of January, 1790, should be delivered up to be cancelled: that the indentures of the 24th and 25th of March, 1790, and the 23d and 24th of December, 1791, and the fines,

levied in pursuance thereof, should stand as a security for the balance, if any, due upon an account; and that the purchases from Pardoe and Davis were to be considered as made for the benefit of the Plaintiff. Accounts were directed of what was due for principal and interest upon the sum of 1100*l.* advanced by the Defendant, and what was paid for his fees and disbursements, &c.; of which a bill was to be delivered; and of the sums advanced by him to Pardoe and Davis for the purchases from them.

1. A GRATUITY, received by an attorney from his client, whilst the latter was, in any degree, under the management or influence of the former, cannot be retained; see, *note*, note 2 to *Newman v. Payne*, 2 V. 139. And a high degree of jealousy will be exercised in scrutinizing transactions which can, at all, be suspected of having originated in a guardian's abuse of his ward's confidence; see note 2 to *Hatch v. Hatch*, 9 V. 692: for the existence of a confidential relation between the parties to an impeached transaction may lay a sufficient ground for the interference of equity, in cases where, if no such confidence had been reposed, equitable relief could not be given: see note 2 to *Crouse v. Ballard*, 1 V. 215. See, also, notes 3 and 4 to the same just-cited case, that a subsequent instrument, professing to be a confirmation of a previous transaction which was open to suspicion, will itself be very rigidly examined; and that, although long delay in bringing forward even the justest claims may, in some cases, bar the title to relief, yet it will be extremely difficult for a confidential agent to set up an available defence grounded on the *laches* of his employer; since length of time weighs less in such a case than in any other: see, to a similar effect, the latter part of note 1 to *Whitchole v. Lawrence*, 3 V. 740.

2. As to the doctrines of maintenance and champerty, see the note to *Wallis v. The Duke of Portland*, 3 V. 494; and note 1 to *Stevens v. Bagwell*, 15 V. 139.

FAWKES v. GRAY.

[* 131]

[ROLLS.—1811, JULY 2.]

LEGACY on condition to be void, in case the legatee should succeed in the event of the death of A. without issue of her body; payment decreed in the life of A. and without security.

MARIAN MILLIGAN by her Will, dated the 4th of January, 1800, among other legacies gave to the Plaintiff Mary Fawkes the sum of 1000*l.*, but under this express condition, that in case she should succeed to the lands and estate of Dalskairth and others in the event of the death of Marian Paterson without heirs of her body, then the said legacy was to be void and null; and after giving some other legacies the testatrix disposed of the residue of her personal estate; and appointed executors.

The Bill was filed in 1810, after the death of the testatrix, but in the life of Marian Paterson, who had issue living; claiming the legacy; insisting, that it was to be void only in the event of the Plaintiff's becoming under an entail, created in 1799, entitled to the estates at Dalskairth previous to the death of the testatrix, or to the

first lawful term after her decease, when she directed the said legacy to be due and payable.

Mr. *Dowdeswell*, for the Plaintiff, contended, that this was an immediate bequest, vested, subject to be divested upon a future contingency, in the nature of a condition subsequent; and there was no bequest over, except the residuary clause; that upon the other construction it must remain dead; no one being entitled to the interest.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT] made the Decree according to the prayer of the Bill; directing the [* 132] stock, in * which the legacy had been invested by the executor, to be transferred to the Plaintiff, and without security, upon the authority of *Griffiths v. Smith* (1).

In the case of *Isaac v. Gompertz*, 1 Ves. Jun. 44, a person entitled to money invested in the name of the Accountant General of the Court of Chancery, petitioned to receive the dividends only, wishing that the principal should continue to stand in the Accountant General's name; but the court refused to make such an order, and directed him to take his money. In that case, the absolute title was clear; but, in *Griffith v. Smith*, 1 Ves. Jun. 98 (where the circumstances were very similar to those of the principal case), Lord Thurlow said, "Suppose there is a contingency of an ulterior claim, still the plaintiffs must have the money; for I cannot keep it in court all that time to wait the event. I must now give these legacies to the plaintiffs: *non constat* now, that the contingency, upon which any legatees over would possibly have a claim, will ever arise; if it should, then the question may be made."

TOWER v. LORD ROUS.

[ROLLS.—1811, JULY 15.]

THE personal estate, being the proper and primary fund for the payment of debts and legacies, can be exempted only by express declaration, or plain and unequivocal manifestation of intention; and neither a charge, nor a direction to sell, nor the creation of a Term for payment, will exempt the personal estate (a). The circumstance, that the residuary legatee is the first taker of the real estate, sometimes held a ground for exempting the personal, [p. 140.]

CHRISTOPHER TOWER by his Will, dated the 4th of June, 1791, duly executed to pass real estate, reciting, that by articles, previous to his marriage, he covenanted to settle certain hereditaments, therein mentioned, to the use of his wife for her life, in case she should survive him, confirmed the said articles; and subject thereto gave and devised all his freehold manors, messuages, farms, lands, titles, tenements, rents, and hereditaments, in the counties of Middlesex, Essex, Hertford, Bucks, and Bedford, and in the city of London, or

(1) *Ante*, vol. i. 97.

(a) See *ante*, note (a) *Kidney v. Coussmaker*, 1 V. 436; Ram, Assets, ch. 3, § 5, p. 41, 42; 2 Williams, Exec. 1215, *et seq.*; and particularly, note (a) *Hartley v. Hurle*, 5 V. 540.

elsewhere, subject to such mortgages and incumbrances as then were, or at the time of his decease might be, affecting the same, and to the payment of his debts and the legacies thereafter given, to the Defendants Lord Rous and Sir George Cornwall, for one thousand years, upon the trusts after mentioned ; and, subject thereto, he gave and devised all his said freehold estates, together with his copyhold estates, except those held of the manor of Hemel Hempstead and all the patronage in the right of placing a master in the Grammar School at Brentwood and five poor people in alms-houses and the right of patronage to the chapel of Brentwood and the rectory of Southwold, &c. to his eldest son for life ; with remainders in strict settlement to his first * and other sons in tail male, [* 133] and remainders over ; and he gave the copyholds of Hemel Hempstead, for such trusts, &c. as, regard being had to the circumstances, nature, and quality, of the estates, would best correspond to the uses, &c. declared concerning the freehold estates ; and he gave and devised to the same trustees, their executors, &c. all his messuages, lands, and premises, which were of leasehold tenure, in trust for the person or persons, who for the time being should be entitled to the immediate possession of the said freehold estates under the limitations, therein contained, to the intent, that the said leasehold estates might go with the freehold so far as the law would permit ; and after the usual powers of leasing, jointuring, and portioning, he directed, that none of the tenants for life of the said estates should fall any timber upon any part of his estates except for necessary repairs, and not in Weald Park even for repairs.

The Will then declared, that the said term and estate for one thousand years, was so limited to the said trustees upon the trusts, &c. after mentioned, viz. In the first place to raise the sum of 1000*l.* for his eldest daughter, above what she was otherwise entitled to by the Will, to be paid twelve months after his death, with interest ; and upon farther trust to sell such part or parts of his said freehold or copyhold estates, except his estates in Essex and Hertfordshire, as they with the consent of the person, who for the time being should be in possession of his estates under the Will, should think proper to sell, in order to pay off and discharge “all mortgages and incumbrances on any of my said estates and all my debts and legacies and particularly what shall be due to my said wife for any arrears of the annuity of 200*l.* per annum given to her by my said uncle’s Will or any security I may have given for her * use for any arrears now due ; and then and in such case I [* 134] give and devise the fee-simple and inheritance of the estates, whether freehold or copyhold, which shall be so fixed on to be sold for this purpose, unto the trustees, to whom I have given the said term ; and I will, that they or the survivor of them or the executors or administrators of such survivor shall sell, dispose and convey, the same accordingly.”

The Will then, after a provision for the discharge and indemnity of the trustees, declared a farther trust ; that, if the 30,000*l.* 3 per

cent. Consolidated Bank Annuities, bequeathed to all the testator's children by his late uncle Thomas Tower, with the accumulated interest, shall not be sufficient to pay to each, as well sons as daughters, except the eldest, who by the limitations shall immediately succeed to the possession of his estate under his Will, the sum of 6000*l.* a-piece, then that the trustees shall by sale or mortgage of all or any part of the freehold estate, or by sale of the copyhold in the county of Bedford, raise the sums following.

The testator farther gave and devised to his wife Elizabeth Tower for her life, for her residence only (but not to let), the use of his mansion-house at Huntsmoor, and of the park there, or of his mansion-house at Gadebridge, and of the land thereto belonging, which he then used therewith, and of twenty acres more of land, adjoining thereto; and willed, that she should have twelve months after his death to make her election respecting those houses; and that in the mean time she should have the use of his mansion-house at Weald, with the offices, gardens, &c. for herself and their children; and that the same should be kept, as it should be at the time of his death, with respect to house-keeping out of the rents of his [* 135] estates during those twelve months for the use of *his said wife and children; and in case the Court of Chancery should on application refuse to make any allowance for the maintenance of his younger children out of the money given to them by the Will of his uncle, he directed his said trustees out of the rents and profits of the estates, comprised in the term of one thousand years, to pay and allow the yearly sums therein mentioned for that purpose; and he willed, that, if at the time of his death he should be entitled to any sum of money as personal estate, charged on any of his estates, before devised, the same should be extinguished for the benefit of the persons, entitled thereto under the limitations aforesaid; and he declared, that his said trustees and also his executors should not be answerable one for another, or for the receipts, acts, &c.; and that his said trustees should retain or repay to each other out of such moneys as should come to their hands or out of the rents of his estates, comprised in the said term of one thousand years, all their reasonable costs, &c. attending the trusts thereby reposed. The Will concluded thus:

"And I do hereby give and devise unto my dear wife Elizabeth Tower 1000*l.*, to be paid to her as soon as possible after my decease, also one moiety of my plate and linen at Weald Hall, and all the furniture at my house called Gadebridge, likewise the best of my carriages and a pair of coach-horses, and two saddle-horses; and all the rest and residue of my personal estate of what nature or kind soever I give and devise the same unto such one of my sons as shall at the time of my decease happen to be my eldest son, and entitled to the possession of my freehold estates, devised by this my Will;" and he appointed his wife and the trustees and the Plaintiff executors.

By a codicil, dated the 5th of November, 1808, the testator

revoked the devises in his Will to his second son George; and gave to Sir George Cornwall an annuity of 200*l.* during the life of his said son George, and in trust for him, charged upon his freehold estates in the counties of Middlesex, Essex, and Bucks; and if his said son should be living at the time of the death of his elder brother, and failure of issue male of his body, then he gave to Sir George Cornwall an annuity of 600*l.* (in lieu of the annuity of 200*l.*) during the life of his son George and in trust for him, charged in like manner; and he gave to his daughters Caroline and Amelia 1000*l.* each upon their respectively attaining the age of thirty-five, if then unmarried; and he gave to his son Henry Tower the sum of 892*l.* 10*s.* 0*d.*; and authorized and empowered Lord Rous and Sir George Cornwall to fell timber or other trees, growing on any of his estates, (except in Weald Park) for or towards raising money to pay off and discharge the mortgages and other incumbrances, affecting any of his estates, and also his debts and legacies; and he willed, that his said trustees should raise such money, either by the ways and means directed by his Will, or by sale of timber, or by all or any of such ways or means, as to them should seem meet; and (after reciting, that under an Act of Parliament an exchange had been made, by means whereof his mansion-house at Huntamoor, and the park and lands thereto belonging, would on his death belong to his wife as part of her jointure) he revoked the choice, given by his Will, of his mansion-houses at Huntamoor and Gadebridge for her life; and (farther reciting, that he had given to his wife the use of his mansion-house at Weald Hall for twelve months after his death) he declared the use thereof to be for her only and such of their children only, as she should think fit to have with her; and he directed, that the house-keeping for his wife at Weald Hall and such family as she might have there should be paid for out of *the rents of his real estates for twelve months [* 137] next after his death: and he willed and directed, that the deer in the park at Weald Hall to the number of not less than one hundred, and all his pictures, paintings, prints, and drawings, plate, linen, china, books, goods, and household furniture, at or in his dwelling-house, called Weald Hall (except such plate and linen as he had given to his wife by his Will, or might give to her by any codicil) should go with the freehold and inheritance thereof according to the limitations contained in his said Will and codicil; and be considered as heir-looms belonging to the said dwelling-house; and he thereby empowered the tenant for life for the time being to cut decayed timber in Weald Park for repairs of his estate in South Weald, but not for sale.

By another codicil, dated the 13th of December, 1809, the testator gave his eldest daughter Elizabeth the sum of 1200*l.* in lieu of the legacy given her by his Will; to his daughters Caroline and Amelia 1000*l.* each in lieu of the legacies given to them by his former codicil: to his sons John and Charles 1000*l.* each: to his son Henry 1000*l.* in lieu of the legacy to him by the

former codicil: to his son William 1000*l.*: to two servants, if in his service at his death, 20*l.* each: all which legacies he directed should be paid at the end of twelve months after his death; and if not then paid, to carry interest at 5*l.* per cent. per annum from that time; and he directed them to be raised in like manner as by his Will and former codicil he had directed his debts and legacies to be raised.

The testator died on the 20th of March, 1810; leaving the Plaintiff Christopher Thomas Tower his eldest son, Elizabeth, his widow, and George, John, Charles, Henry, William, Elizabeth, Caroline, and Amelia, his other children surviving him.

[*138] *The Bill prayed an execution of the trusts of the Will; and a declaration, that the Plaintiff is entitled to such part of the personal estate as is not specifically bequeathed free from the debts, legacies, and funeral expenses; and that a sufficient sum may be raised by sale of the real estate, or of the timber thereon, to pay the debts, legacies, &c. according to the Will; to be applied in exoneration of the personal estate.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Plaintiff: Mr. *Richards* and Mr. *Pepys*, for the Defendants.

1811, *July 15th.* The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The personal estate, being the proper and primary fund for the payment of debts and legacies, can be exempted only by express declaration, or plain and unequivocal manifestation of intention. The question generally is, whether there is sufficient evidence of that intention. It is agreed, that neither a charge upon the land, nor a direction to sell, nor the creation of a term for payment, will exempt the personal estate (1). There is in this Will a charge of debts and legacies; and a term created for payment of them: but there is nothing particular in the manner of making that charge; or the mode, in which the trust of the term is declared: nothing, denoting, that the testator intended the land to be the primary, still less the exclusive, fund. Then it is contended, that the inference might arise from the manner of giving the personal estate: but there is nothing except the common residuary clause: "all the rest and residue of my personal of what
[*139] nature *or kind soever:" Not "all my personal estate:" not "all, which I have not hereinbefore disposed of;" or any other of those forms, which in several cases have been held to denote an intention to give the personal estate as a specific bequest. Indeed here the residuary legatee could not take specifically what might be left, after separating from the personal estate the particular articles, given to the widow; as it is admitted, that there is a charge of uncertain amount, which must necessarily fall upon it: viz. the

(1) *Ante*, *Watson v. Brickwood*, vol. ix. 447; *Hancox v. Abbey*, xi. 179, and the references in the note, iii. 106, *Gray v. Minnethorpe*; *Aldridge v. Lord Wallscourt*, 1 Ball. & Beat. 312.

funeral and testamentary expenses ; affording the inference, that he did not intend to give his personal estate as a specific bequest.

It is said, the disposition, made in favor of the widow as to keeping up his mansion-house twelve months for her use, &c., could not be effected, unless the son had the personal estate exempt from the debts and legacies ; as the executors would be bound immediately to proceed to a sale of the furniture for the purpose of paying them : but, if the intention was, that the furniture should remain in the house a year, the widow was herself a specific legatee of the furniture during that period ; and it was immaterial to her, whether at the end of that time the son took it as a specific legacy or as assets for debts. Upon the general scope of the Will there is nothing, leading me to suppose, the testator meant to increase his personal estate at the expense of his real : on the contrary there is a direction, that any sums he may be entitled to as personal estate, charged upon real, shall be extinguished for the benefit of the person, entitled to the real. The personal estate is not given to any one by name, but it is to such son as should be the eldest at his decease ; and who in that character he supposed would be entitled to the real estate. The * very circumstance, that the re- [* 140] siduary legatee is the first taker of the real estate, has been sometimes held a ground for exempting the personal estate. However, it is enough to say, there is not upon this Will sufficient evidence of the testator's intention to exempt it.

SEE note 1 to *Kidney v. Coussmaker*, 1 V. 436 ; notes 2, 3, 4, to *Hamilton v. Worley*, 2 V. 62 ; and note 3 to *Brunnel v. Protheroe*, 3 V. 111.

PYE,
DUBOST, } *Ex parte.*

[1811, APRIL 26, 29; MAY 27; JUNE 13, 28.]

THE presumption of intention to satisfy a legacy by a portion to a child, from a parent, or a person placing himself in *loco Parentis*, not raised upon a legacy, not described as a portion; the legatee, reported to be the testator's natural daughter, described, not so, but as the daughter of another man (a).

Direction for sale or transfer of stock without attention to the rise or fall: the party must take it, as it happens at the time of appropriation.

The law does not acknowledge the relation of a natural child (b), who is therefore considered as a stranger within the rule of satisfaction of a legacy *prima facie* by an advance of money, [p. 147.]

Distinction between a voluntary contract and a trust created without consideration: in the latter case the Court acts; not in the former (c), [p. 149.]

Legacy by a parent to a child, the purpose not stated, understood as a portion, [p. 151.]

Leaning against double portions: effect in some cases, that a portion has been held to satisfy a legacy of much greater amount (d), [p. 151.]

(a) Where a parent, or other person in *loco parentis*, bequeaths a legacy to a child or grandchild, and afterwards in his life-time gives a portion, or makes a provision, for the same child or grandchild, without expressing it to be in lieu of the legacy; in such a case, if the portion so received, or the provision so made, on marriage or otherwise, be equal to, or exceed, the amount of the legacy; if it be certain, and not merely contingent; if no other distinct object be pointed out; and if it be *ejusdem generis*, then it will be deemed a satisfaction of the legacy, or, as it is more properly expressed, it will be held an ademption of the legacy. If the portion be less than the amount of the legacy, it will be deemed a satisfaction *pro tanto*; and if the difference between the amounts be slight, it may be deemed a complete satisfaction or ademption. But if the difference be important, the presumption of an intention of substituting the portion for the legacy, will not be allowed to prevail. 2 Story, Eq. Jur. § 1111.

The question sometimes arises, who is deemed to stand in *loco parentis* to another. It has been held by the Vice-Chancellor (Sir L. Shadwell), that no person can be deemed to stand in *loco parentis* to a child whose father is living, and who resides with and is maintained by the father, according to his means. He added, it may be very different, where the father, though living, does not maintain the child, and the latter does not live with him, but lives with the person assuming to stand in *loco parentis*; *Bowys v. Mansfield*, 6 Sim. 528. On Appeal Lord Cottenham said; "No doubt the authorities leave in some obscurity the question, as to what is to be considered as meant by the expression, universally adopted, of one in *loco parentis*. Lord Eldon, however, in *Ex parte Pye* has given to it a definition, which I readily adopt, not only, because it proceeds from his high authority, but because it seems to me, to embrace all that is necessary to work out and carry into effect the object and meaning of the rule. Lord Eldon says, it is a person, meaning to put himself in *loco parentis*; in the situation of the person described as the lawful father of the child. But this definition must, I conceive, be considered as applicable to those parental offices and duties, to which the subject in question has reference, namely, to the office and duty of the parent to make provision for the child. The offices and duties of a parent are infinitely various, some having no connexion whatever with making provision for the child; and it would be most illogical, from the mere exercise of any such offices or duties by one not the father, to infer an intention in such person to assume the duty of providing for the child." *Powys v. Mansfield*, 3 Mylne & Craig, 359.

(b) See *post*, p. 288, note (a) *Arnold v. Preston*.

(c) See *ante*, note (d) *Pulvertoft v. Pulvertoft*, p. 84; 2 Story, Eq. Jur. § 793a.

(d) See *ante*, note (a) *Baugh v. Read*, 1 V. 257. This is said to be sustained by extremely artificial reasoning, and such as an ingenious mind may find it extremely difficult to follow. 2 Story, Eq. Jur. § 1113.

As to the evidence of a person, giving a legacy and advancing a portion as standing *in loco Parentis*, *Quere* (a), [p. 152.]

Distinction between legitimate and natural child, as to the presumed satisfaction of a legacy by a portion in the former case, not the latter; which is considered the case of a stranger (b), [p. 152]

Legacy from a father to a child understood as a portion, though not so described, (c), [p. 153.]

WILLIAM MOWBRAY by his Will dated the 10th of April, 1806, giving his wife the residue of his property after payment of his debts, except the sums after mentioned, among other legacies gave as follows: "I give and bequeath the sum of 4000*l.* sterling to Louisa Hortensia Garos daughter of John Louis Garos formerly of Berwick Street Westminster: the like sum of 4000*l.* to Emily Garos her sister and 4000*l.* to Julia Garos her other sister; and in case of the death of one of the three I desire that the legacy may be divided equally betwixt the two surviving sisters; and in case of the death of two of them I desire the whole 12,000*l.* may be paid to the surviving sister."

The testator also gave to John Louis Garos 600*l.*; and "to Marie Genevieve Garos his wife the sum of 2500*l.* sterling for her *own use, and over which her husband is not to have [* 141] any power: he having lived abroad for many years; and she in this country; and no correspondence having passed between them during that time. Her own receipt shall be a sufficient authority to my executors for paying her the above legacy."

The testator died on the 8th of June, 1809. His widow became a lunatic: the petitioner Pye was the Committee under the Commission; and upon her death took out administration to her, and administration *de bonis non* to the testator.

The Master's Report stated from the examination of the petitioner Pye, that Louisa Hortensia, Emily, and Julia, Garos were the three natural daughters of the testator by Marie Genevieve Garos the wife of John Louis Garos; and that since the date of the Will Louisa Hortensia Garos married Christopher Dubost; and the testator advanced as a marriage portion for her, which by the settlement appeared to have been received by Christopher Dubost, the sum of 3000*l.*; and it being contended, that the said sum of 3000*l.* ought to be

(a) As to the admission of extrinsic evidence in such cases, see *ante*, notes (a) and (b) *Trimmer v. Bayne*, 7 V. 508.

(b) The rule is applicable only to legitimate children, unless the party has voluntarily placed himself *in loco parentis* to a legatee, not standing either naturally, or judicially in that predicament. All other persons are, in contemplation of law, treated as strangers to the testator. 2 Story, Eq. Jur. § 1111, note (1), 1116; *Powys v. Mansfield*, 6 Sim. 528; *S. C.* 3 Mylne & C. 359.

As to illegitimate children, see *ante*, note (a) *Cartwright v. Fawdry*, 5 V. 530.

(c) See *ante*, note (a) *Tolson v. Collins*, 4 V. 483. Where a debtor bequeaths to his creditor a legacy equal to, or exceeding the amount of his debt, it shall be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt. But the Court will lay hold of slight circumstances to evade this presumption. See *ante*, note (c) *Hinchcliffe v. Hinchcliffe*, 3 V. 516; note (a) *Richardson v. Elphinstone*, 2 V. 463.

considered as an advancement, and in part satisfaction of the legacy of 4000*l.*, and the whole legacy being claimed on the part of Christopher Dubost and his wife, (who were both represented to be residing abroad) the Master did not allow the claim. (1547/11)

As to the legacy of 2500*l.* to Marie Genevieve Garos the Report stated from the same examination, that since the date and execution of the Will the testator caused an annuity to be purchased in France, to which country she had retired for her life, and laid out in such purchase 1500*l.* and, it being contended by the [* 142] petitioner Pye, that the *said sum of 1500*l.* ought to be deducted from the legacy of 2500*l.*, as being an advancement, and in part satisfaction, and the whole legacy being claimed by the legatee, then resident abroad, the Master had not allowed such claim; but left it open to the party to prosecute, when in a situation to do so.

By a farther Report the Master found as to the French annuity, that by a letter, written by the testator to Christopher Dubost in Paris, on the 25th of November, 1807, the testator authorized him to purchase in France an annuity of 100*l.* for the benefit of the said Marie Genevieve Garos for her life, and to draw on him for 1500*l.* on account of such purchase; and under that authority Dubost purchased an annuity of that value; but that, as she was married at the time, and also deranged, the annuity was purchased in the name of the testator; and the testator sent to Dubost by his desire a power of attorney authorizing him to transfer to Marie Genevieve Garos the said annuity, dated the 10th of June, 1808.

The Report farther found upon the affidavit of Dubost and the copy of the deed, that the first intimation he received of the death of the testator, who died in June 1809, was in November 1809; and that, in ignorance of such death, Dubost on the 21st of October, 1809, exercised the power, vested in him, by executing to Marie Genevieve Garos, her late husband being then dead, and she of sound mind, a deed of gift of the said annuity; and the Master found, that by the Law of France, if an attorney be ignorant of the death of the party, who has given the power of attorney, whatever he has done, while ignorant of such death, is valid. The Master therefore stated his opinion, that the annuity was no part of the personal estate of William Mowbray.

[* 143] The first petition, prayed, that so much of *the Report as certifies the French annuity to be no part of the testator's personal estate may be set aside; and that it may be declared, that the said annuity is part of his personal estate.

The other petition, by Dubost and his wife, prayed a transfer of 3*l.* per cent. Bank Annuities in satisfaction of 1000*l.* of the legacy; and that so much of the Bank Annuities as will be sufficient to raise 3177*l.* 3*s.* 6*d.*, the residue of the said legacy and interest, may be sold, &c.

An affidavit was offered by Dubost, that upon the treaty of marriage the testator assured him, that independent of the 3000*l.* he had

already bequeathed her 4000*l.*; and Dubost might depend upon his not altering it. A letter was also produced to the testator from Dubost, previous to the marriage, stating, that he would not believe the information he had received, that the testator, being asked, whether he would remember the young ladies in his Will, answered, "You cannot expect that;" that he had said to Mrs. Dubost, that he did not see, why there should be a difference between the sisters; and asking, if, according to the custom in France, he would give besides the portion 100*l.* to be laid out in jewels, &c. This letter was found after the testator's death among his papers.

Sir Arthur Piggott, Mr. Richards, Mr. Wingfield, Mr. Horne, and Mr. Wear, for different parties, in support of the first Petition.—The French annuity being purchased in the testator's name, and no third person interposed as a trustee, the interest could not be transferred from him without certain acts, which were not done at the time of his death. It was therefore competent to him during his life to change * his purpose, and to make some other pro- [* 144] vision for this lady by funds in this country; conceiving, perhaps, that she might return here. The authority given to purchase this annuity, could not have been enforced against him during his life by a person, claiming as a volunteer: nor can it be established against his estate after his death: the act, which would have given the benefit of it against the personal representative, not having been completed (1). Where a question is to be decided by a foreign Law, the first step is an inquiry by the Master, to ascertain, what is the Law of that country.

With regard to the other Petition, and the objection to the letter, offered as evidence, the circumstances resemble those of *Shudal v. Jekyll* (2), before Lord Hardwicke, *Powel v. Cleaver* (3), before Lord Thurlow, and *Trimmer v. Bayne* (4), before your Lordship; and the conclusion is, that the evidence is admissible. Lord Hardwicke's opinion was, that this rule as to satisfaction is not confined to the case of a parent. It is true, it does not apply to a mere stranger, standing in no relation, natural or civil, either as a legitimate, adopted, or natural child: but it applies to any person, standing *in loco parentis*, equally as to the parent. The presumption was repelled in *Shudal v. Jekyll* by the evidence; which was held to be admissible; and proved, that the testator had no intention of limiting his bounty to the portion he had given on the Plaintiff's marriage; declaring, that he would leave her something by his Will; but would not be put under any obligation to do it; * the [* 145] evidence therefore contradicting the supposed intention to substitute the portion for the legacy.

(1) *Cotteen v. Missing*, 1 Madd. 176. See the references in the note, *ante*, vol. ii. 120.

(2) 2 Atk. 516.

(3) 2 Bro. C. C. 499.

(4) *Ante*, vol. vii. 508; *Robinson v. Whitley*, ix. 577; see *Ellison v. Cookson*, i. 100, and the notes, 112, 259. As to satisfaction of a debt, generally, by a legacy, *Wallace v. Pomfret*, xi. 542.

The case of *Powel v. Cleaver* certainly had strong circumstances, admitting argument ; and Lord Thurlow, finding the legatee a mere stranger to the testator, who, though undoubtedly he provided a portion for her on marriage, stood in no relation to her, and could not be considered as having taken upon him the character of parent, determined against her claim of a double provision.

Trimmer v. Bayne was the case of a provision for a natural daughter, which has been considered as a solid distinction ; and your Lordship decided that case with great attention, and upon a full review of the authorities. Upon the evidence it is impossible to deny the intention to make a provision at least for an adopted child, whom the testator had educated ; and that there was an ulterior purpose in his mind. This is the same species of case as *Shudal v. Jekyll* ; in which the provision by the Will, accompanied with the declared intention of the testator to do something more for his niece, justified Lord Hardwicke's decision ; and the same principle, that governed that case and *Trimmer v. Bayne*, though with a different effect, must be applied to this : the case of a person, treated by the testator as a child, adopted and educated by him, standing upon the evidence of this letter *in loco parentis* and *filia* ; having from the infancy of these children acted as their parent ; and therefore as much within the rule as the actual relation of parent and child ; and the circumstance, that the legacy is given over upon the contingency from one child to another, cannot prevent its application. The letter of Dubost, which is clearly evidence, is decisive. It is the letter of a person, treating upon the subject of his proposed marriage

[* 146] *with the testator, as her parent, and also as having made a provision for her by his Will. The circumstance, that this letter, which came out of the testator's papers after his death, had been kept by him, the settlement following immediately upon it, is remarkable. The Master's Report therefore is right ; and the second petition must be dismissed.

Sir *Samuel Romilly* and Mr. *Bell*, in support of the second petition ; (referring, in opposition to the other petition, to the present Law of France, declaring, that, if the mandator is unacquainted with the death of the mandant, or any other cause, which put an end to the mandate, whatever he has done, while he was so unacquainted, is valid.)

It cannot be disputed, that the advance of a portion by a parent on the marriage of his child is a satisfaction of a legacy, either the whole, or part ; and that, if the testator, though not the natural or legitimate father, has placed himself *in loco parentis*, the same consequence will follow. The difference consists in the application of that principle ; and the question is, whether the testator gave this legacy as to his child ; which must be made out : otherwise the presumption of satisfaction cannot arise. In no case has the Court proceeded on any other supposition than that the legacy was given to the legatee as a child. If a legacy was bequeathed to a child, with whom the testator had then no connection, but afterwards married

the mother, took that child as his adopted child, and gave it a portion as such, the legacy not being given in the same character, the portion would not be a satisfaction: the clear conclusion from all the authorities being, that they must be given in the same character.

In this case the legacy clearly is not given to the legatee *as the child of the testator; and no evidence can be [* 147] received to show, that it was given to her in that character; the Will containing an express statement by way of description certainly, that she is the child of another man. The objection to the letter, as evidence, is, that it is produced directly to contradict the Will; which declares her to be the daughter of another. If however it can be received, the fair inference is, that she was to have both the legacy and the portion. It is a letter from the proposed husband, suggesting to the testator, that he ought besides the portion to give this lady a legacy; and representing, that he could not believe, as it was said, that he intended the contrary. The testator leaves the legacy standing; keeping the letter; which must have drawn to his attention, that besides the portion he had given her a legacy. The fair inference is, that the letter had its effect; inducing him to make no alteration in the Will, but to leave the legacy standing. How is that to be otherwise accounted for? Can it be conceived, that this testator was acquainted with these decisions; and thence collected, that upon this doctrine of satisfaction it was unnecessary for him to make the alteration? The case of *Grave v. Lord Salisbury* (1), the decision certainly turning upon particular circumstances, is material, as showing Lord Thurlow's reluctance to extend this rule; of which he evidently disapproved.

The Lord CHANCELLOR [ELDON].—I recollect that Lord Thurlow in that case, though the decision did not turn upon it, remarked, that, as the Law *will not acknowledge the relation of a natural child (2), the doctrine of this Court, on whatever principle founded, is, that if a portion is given to a child by Will, or a gift, so constituted as to acknowledge the legal relation, and afterwards an advancement is made on marriage, that is *prima facie* an ademption of the whole, or *pro tanto*; but if the legacy is given to a person, standing in the relation of a natural child to the testator, and he afterwards gave that child a sum of money on marriage, the law does not admit the conclusion *prima facie*, that the testator at the time of making the Will recognized that relation: the natural child therefore is in so much better a situation, that in his case the advancement is not *prima facie* an ademption; as it is in the case of a legitimate child: the effect of which is, that the presumption is to be formed consistently with the notion, that the testator has less affection for his legitimate child than even for a stranger; as Lord Thurlow used to express it. His Lordship also made another observation, of great weight, that ought to check any dispo-

(1) 1 Bro. C. C. 425.

(2) See the notes, *ante*, vol. iii. 12; v. 534.

sition to carry this farther ; that, having raised the presumption from the fact, you beat it down by declarations, which from the very nature of mankind deserve little credit ; viz. what a man has done, or will do, by his Will : how much shall stand ; and how much shall not : declarations generally intended to mislead (1) : but the *prima facie* presumption is established beyond controversy.

The question is certainly of great consequence, whether this class of cases does, or does not, require evidence, that at the time the legacy was constituted, the legatee, not standing in the relation of child to the testator, was regarded by him *quasi* in that relation ; conceiving the purpose of placing himself in *loco Parentis* ; and, if it is necessary, that such a relation must then exist, it is [* 149] very difficult to conclude, that this particular * case falls under that description. His purpose, whatever was his opinion with regard to these children, seems to have been, that no one should consider him as standing in the place of father. His expressions seem particularly selected with the view to avoid the description of a portion ; and to denote, that, not he, but some other person, stood in the situation of parent.

In *Shudal v. Jekyll*, and the subsequent case before Lord Thurlow, upon the same principle holding, that by such a declaration, that he might leave something, but would not specify what, or be bound, the legacy could not be partly cut down ; a natural interpretation was, that taking 500*l.* from the legacy, and leaving 500*l.*, he did leave something more beyond what he had advanced : but Lord Hardwicke correctly said, he had no means of collecting what was that something more ; and the Will, giving 1000*l.*, was better evidence than any conjecture he could form. If this letter can be considered as fair evidence, that he did not mean to disturb the Will, and that this fortune, as it is called in the letter, should be an ademption of that fortune, the doctrine of *Shudal v. Jekyll* must be applied to this case. This is a very important question ; and I wish to read the cases, particularly *Trimmer v. Bayne* ; upon which occasion I gave the subject considerable attention.

The other question involves, not only the construction of the French law, and the point, whether that has been sufficiently investigated, but farther, whether the power of attorney amounts here to a declaration of trust ? It is clear, that this Court will not assist a volunteer : yet, if the act is completed, though voluntary, the Court will act upon it. It has been decided, that upon an agree- [* 150] ment * to transfer stock this Court will not interpose ; but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more ; and the Court will act upon it (2).

June 13th. The Lord CHANCELLOR [ELDON].—These petitions

(1) *Ante*, vol. i. 359.

(2) *Ante*, 99.

call for the decision of points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon the Court. With regard to the French annuity, the Master has stated his opinion as to the French law perhaps without sufficient authority, or sufficient inquiry into the effect of it, as applicable to the precise circumstances of this case: but it is not necessary to pursue that; as upon the documents before me it does appear, that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration, that he held this part of the estate in trust for the annuitant.

The other question is one of great difficulty; whether a sum of money, advanced upon the marriage of one of these young ladies, when a settlement was executed, is to be taken to be a satisfaction of a legacy, not given upon the face of the Will as a portion, not given to a person stated upon the Will to be an adopted child of the testator, or described merely by name, but given to an individual, a stranger, described in the Will as the child of another person; who is designated as the father of that child. It not only does not appear, that the testator represented himself as *in loco Parentis*, but he has designated another individual as being the parent; and therefore according to Lord Thurlow's opinion in *Grave v. Lord Salisbury* (1) the testator has expressed himself *in terms, [* 151] anxiously calculated to conceal the fact, that he was the reputed father of that child; if he was so.

Without going through all the cases, that were cited, and those referred to in them, having compared the case in *Atkins* with manuscript notes of that case, and looked into some other cases, one in *Ambler* (2), and some earlier, I may state as the unquestionable doctrine of the Court, that where a parent gives a legacy to a child, not stating the purpose, with reference to which he gives it, the Court understands him as giving a portion; and by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion, that the father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole, or in part; and in some cases it has gone a length, consistent with the principle, but showing the fallacy of much of the reasoning, that the portion, though much less than the legacy, has been held a satisfaction in some instances upon this ground, that the father, owing what is called a debt of nature, is the judge of that provision by which he means to satisfy it; and though at the time of making the Will he thought he could not discharge that debt with less than 10,000*l.* yet by a change of his circumstances, and of his

(1) 1 Bro. C. C. 425.

(2) *Watson v. The Earl of Lincoln*, Amb. 325.

sentiments upon that moral obligation, it may be satisfied by the advance of a portion of 5000*l*.

The Court seems in the older cases to have met with some difficulty in determining, whether this rule should be confined [* 152] to those, who stood in the actual relation of *parent and child ; and it has accordingly been urged in argument, but not supported by decision, except where accounted for by evidence of declarations, that the Court have said, they did not mean to confine this doctrine to persons standing in that actual relation ; but perhaps it might apply to a person, placing himself in *loco Parentis*, undertaking the care of an orphan : but what is to be the evidence of that, whether written evidence in the Will and Settlement, or the conduct observed at the marriage, or to be derived from mere declarations, is left so much afloat, that there is considerable difficulty in making a judicial decision upon it.

In *Grave v. Lord Salisbury* (1), the first case before Lord Thurlow, Lord Salisbury had several natural children ; to whom he had given legacies by his Will ; making afterwards a provision for them during his life, not *ejusdem generis* ; giving the living of Hatfield to one ; a farm and stock to another ; upon which the question arose. It was contended, that this was a satisfaction ; that he intended by the legacy to make a provision, or in other words to discharge the obligation, he owed to that child ; and he had the same intention, advancing the portion, and the farm and stock. Lord Thurlow felt the extreme hardship, as it is evidently, that in the case of children, whose relation, as such, the law recognises, the doctrine of presumption is, that a subsequent advancement is a satisfaction of a legacy to such a child : but, as the law does not recognize the relation between the putative father and illegitimate child, as imposing this debt of nature, the father in that case stands as a stranger ; and no such presumption arises in that case, where the subsequent advance is not proved to have been for the very purpose of satisfying [* 153] the legacy ; and *therefore the legatee is entitled to both.

Lord Thurlow directed a reference to the Master to inquire into the circumstances, who did not report the relation, which the testator had to those children ; and his Lordship, being pressed to send it back on that account, refused to do so ; observing, that the object might have been to conceal the circumstance of that relation ; and therefore the Court would not make the inquiry : but without deciding, what would have been the case, if that relation appeared, it was enough, that it stood as the case of a stranger ; and therefore the other provision was not a satisfaction.

In the subsequent case of *Powel v. Cleaver* (2), where the provision made was described as a portion, Lord Thurlow stated expressly, that, if the legacy is given, not as a portion, by a stranger, who advances money on the marriage of the legatee, denominating that

(1) 1 Bro. C. C. 425: *Wetherby v. Dixon*, *post*, vol. xix. 407 ; Coop. 279.

(2) 2 Bro. C. C. 499.

advance a portion, that denomination will not have the same effect in the case of a stranger, as it would in the case of parent and child; and Lord Thurlow asserts, that there is no authority contradicting that.

If that is right, it comes to this; that, where a father gives a legacy to a child, the legacy, coming from a father to his child, must be understood as a portion, though it is not so described in the Will; and afterwards advancing a portion for that child, though there may be slight circumstances of difference between that advance and the portion, and a difference in amount, yet the father will be intended to have the same purpose in each instance; and the advance is therefore an ademption of the legacy; but a stranger, giving a legacy, is understood as giving a bounty, not as paying a debt; he must therefore be proved to mean it as a portion, or provision, * either upon the face of the Will, or, if it may [* 154] be, and it seems that it may, by evidence, applying directly to the gift, proposed by that Will; and recollecting, how artificial the rules are, where a person has educated a child through life, considering himself as standing in the relation of putative father to that child, having a father acknowledged, describing that child as the child of a mother named, and a father named, and also making a provision for that father and mother, it would be too much upon such a Will to say, this is the case of a person, meaning to pay, not what the Court calls a debt of nature, but a debt he meant to contract: in other words meaning to put himself in *loco Parentis*, in the situation of the person, described as the lawful father of that child.

That brings the question to this; whether this advance of a portion of 3000*l.* is an ademption of the legacy, between strangers, on the ground, that this subsequent advance is treated as a portion, or fortune; and whether, the testator having given that legacy of 4000*l.*, and afterwards giving to that legatee a portion on marriage, the mere circumstance of giving that as a portion or fortune is to be taken as evidence, that, when the Will was made, it was meant as paying a debt of nature; or whether it was not to be understood as in the first instance giving a bounty, and in the other making an addition to that bounty. In this case, as in *Shudal v. Jekyll*, more was intended to be given: but in the case of a stranger no authority says, the advance of a less sum shall be an ademption of the whole. This letter, if it is to be admitted in evidence, shows, how little such evidence can be trusted; as no one would have supposed, upon the correspondence, that the testator had such a Will in his desk. Upon the authority of *Powel v. Cleaver*, unless you can show, that at the time of making the Will the testator meant to give * a portion as parent, or as standing in *loco parentis*, and [* 155] meant to satisfy that in the whole or in part by the subsequent advance, the Court is not authorized by the artificial rules of Equity to hold it a satisfaction.

I am not much impressed by the objection, that he had not altered

his Will. The answer is, that the subsequent advance operates a revocation; and therefore actual revocation is unnecessary: but it is too much to say upon such circumstances as are before me, that this advance of 3000*l.* is an ademption of the legacy of 4000*l.* and the contingent interest: and, though I believe I am disappointing the actual intention, and that this lady will get more than was intended, I am bound by the rule of the Court to say, that this is not a satisfaction.

June 28th. Under this Judgment the Order was pronounced, dismissing the first petition, and directing a transfer and sale of the Bank Annuities, according to the prayer of the other; upon which it was contended, that this should be considered as an appropriation of the Stock to this legacy at the date of the Master's Report; and, the funds having since fallen, the legatee was entitled only to so much Stock as would at that time have produced what remained due on account of the legacy.

The Lord CHANCELLOR [ELDON] said, the broad principle of the Court is, that no attention whatever is paid to the rise or fall of the stock; and upon that ground it is considered equal, whether the appropriation is on one day or another: the party takes the rise or fall, as it happens; and therefore the petitioners are entitled to have the sum, reported due to them, now raised.

1. A LEGACY given to a child, by a parent, or one who has distinctly put himself in *loco parentis*, is considered, as between parties standing in such relation to each other, to have been intended by way of portion: on this ground, if the parent, after making his will, and thereby bequeathing a legacy to the child, give that child a portion, this is usually looked upon as an ademption of the legacy: see, *ante*, the notes to *Ellison v. Cookson*, 1 V. 100; note 6 to *Blake v. Bunbury*, 1 V. 194; and note 2 to *Barclay v. Wainwright*, 3 V. 462. A man is, of course, not prohibited from showing a tardy sense of moral duty, by placing himself in *loco parentis* to an infant whom he believes to be his own natural child; and if he have done this, the rule above stated, with respect to the ademption of a legacy by a portion, will apply: *Trimmer v. Bayne*, 7 V. 508. But, in consideration of law, no relationship exists between such parties; and, unless the father has distinctly recognised the connexion, or, at least, unless he has used in his will expressions from which that recognition can be inferred, a legacy given by a man to one who is in truth the testator's illegitimate child must be considered as a legacy to a perfect stranger: and a portion advanced to a stranger by one who did not assume the parental character, or profess to be discharging parental duties, would, *prima facie*, be no ademption of a legacy given to the same individual by the will of the same benefactor. This rule (as was observed in the principal case) may have the effect, in some instances, of placing illegitimate offspring in a more advantageous situation than legitimate children; and, if such a result ever should appear to be the necessary consequence of adhering to the established doctrines on the subject, the inconvenience must be submitted to; though there may be good reason for supposing that no such result was contemplated by the testator; *Wetherby v. Dixon*, 19 Ves. 412; *Smith v. Cunningham*, 1 Addams, 460.

2. That a court of equity will not assist mere volunteers, where the voluntary contract remains unexecuted, see note 2 to *Colman v. Sarell*, 1 V. 50; and note 5 to *Curtis v. Perry*, 6 V. 739.

HOOPER v. GOODWIN.

[ROLLS.—1811, JULY 9, 15.]

CONVERSION directed by Will of real estate into personal, not to all intents, but for the purpose only of answering legacies and annuities : subject to that as to the real estate a resulting trust for the heir ; which cannot be affected by an unattested codicil, bequeathing a lapsed share of the residue (a).

Conversion of real estate into personal complete for all the purposes of the Will, not for the next of kin in case of lapse, [p. 165.]

Real estate cannot be converted into personal by Will so as to enable the testator to make a direct disposition of it by an unattested codicil, [p. 166.]

Distinction between legacies, charged on the land as an auxiliary fund, and a portion of the land, or its produce, when directed to be sold. An unattested paper has effect in the former case : not in the latter, [p. 167.]

HENRY GOODWIN by his Will, duly executed to pass real estate, increasing an annuity of 250*l.* for his wife Amelia Goodwin under a deed of separation to 400*l.*, and giving after the decease of his wife 8333*l.* 6*s.* 8*d.* Stock, upon which the original annuity was secured, to the children of his niece Susanna Bayly, equally at the age of twenty-one, in case no child should attain twenty-one, or leave issue, directed, that the said 8333*l.* 6*s.* 8*d.* Stock should fall into the residue of his personal estate. Then, after giving a legacy of 1000*l.* to his wife, to be paid as soon as may be after his decease on condition of releasing dower, and some other dispositions, he devised several real and leasehold estates in the counties of Monmouth and Gloucester to Frances Catchmayd and other persons, in trust to sell ; and invest the produce in stock, for the purpose of answering and paying, or contributing towards answering and paying the several annuities and legacies by that his Will given and bequeathed, and to, for, or upon, no other use, intent, or purpose, whatsoever. He then gave a legacy of 12,000*l.* to his brother on condition of releasing his freehold estate from an annuity, and taking it out of his funded property : and, among several annuities, gave to Edward Hooper and his wife and the survivor an annuity of 50*l.* ; and after the decease of the survivor gave so much of his Stock as shall have been set apart to answer that annuity to and among their children ; and, in case no child should survive them, directed, that the capital fund, intended for the benefit of their children, should sink into the residue of his personal estate ; and he directed, that the whole of the before-mentioned annuities shall be charged [* 157] upon his capital stock or fund in the 3 per cent. Consolidated Bank Annuities ; and when and as the several annuitants

(a) What amounts to conversion, see *ante*, note (a) *Sheddon v. Goodrich*, 8 V. 481 ; note (a) *Wheldale v. Partridge*, 5 V. 397.

As to the effect of an unattested codicil, see *ante*, note (b) *Buckridge v. Ingram*, 2 V. 652 ; note (d) *Habergham v. Vincent*, 2 V. 204.

A recent Act of Parliament, (1 Vic. c. 26, § 5,) and the legislation of several of the United States, have varied the common law, and prescribed the same form in the execution of a will of personal property, as in that of a will of land. See *ante*, note (a) *Ellis v. Smith*, 1 V. 11.

die, that so much of the capital, as was set apart for such annuity, except otherwise disposed of by his Will, shall immediately after the death of such annuitant sink into and become a part of his residuary personal estate; and be transferred by his executors to the several persons "by this my Will entitled to such my residuary personal estate."

The testator then, giving a great number of legacies, directed, that the whole of the before-mentioned legacies, shall be payable out of his aforesaid capital stock or fund of 3l. per cent. Consolidated Bank Annuities at the end of one year after his decease; and also in case any of the said annuitants or legatees shall die in his lifetime, that the stock or fund, which would have been appropriated for the payment of such annuitants or legatees respectively, shall sink into his residuary personal estate; and be transferred on his decease to the persons, entitled to such estate by this his Will, except otherwise hereinbefore disposed of. He then gave several charitable legacies; and directed, that all the before-mentioned annuities and legacies arising out of his personal estate and all personal legacies, which he may give by any codicil or codicils to his Will, shall be preferred to the legacies given to charitable uses in the subsequent part thereof; and not to be liable to any reduction, in case his personal estate shall prove insufficient fully to defray such legacies to charitable uses. He then, after several other charitable legacies, ordered, that all the said charitable donations be paid at the end of one year after his decease out of his property in the 3l. per cent. Consolidated Bank Annuities, provided there shall remain enough in the said fund, after receiving sufficient to defray the before-mentioned legacies and annuities, for that purpose, but not

[* 158] * otherwise; and if any deficiency of the said stock after making such reserve shall happen, he directed, that an equal reduction shall be made from each charitable donation or bequest in proportion to the sum given; and all the rest, residue and remainder, of his estate and effects whatsoever and wheresoever, and of what nature or kind soever, he gave and bequeathed to his daughter Susanna Ann Goodwin, his nephews John and Peter Kington, and his said niece Susanna Bayly, to be equally divided between and amongst them share and share alike.

By a codicil, dated the 2d of February, 1808, attested by two witnesses, reciting, that by his Will, after disposing of his landed and other property, and bequeathing several legacies and annuities, he gave, devised and bequeathed, all the rest, residue and remainder, of his estate and effects, unto his daughter Susanna Ann Goodwin, his nephews John and Peter Kington, and his niece Susanna Bayly, to be equally divided amongst them share and share alike, and that by the recent death of Peter Kington his residuary estate and effects in case of his dying without altering his said Will would become divisible amongst the survivors of his said residuary devisees, which is not his intention, he therefore revoked such before-mentioned devises and bequests in his Will; and did thereby

give, devise, and bequeath, all the rest, residue and remainder, of his estate and effects, after defraying the several legacies and annuities in his said Will, and in this and a former codicil, dated the 21st of December last, to his daughter, his nephew John Kington, his niece Susanna Bayly, and his grand-niece, the only daughter of Peter Kington, to hold in equal proportions, share and share alike; and he directed, that in case Susanna Bayly shall die in his lifetime, her share of his said residuary estate and effects shall be distributed amongst * such of her children as shall [* 159] survive him; and he gave two more annuities, to be paid by his executors and trustees out of the dividends of a sufficient sum of capital stock standing in his name in the 3*l.* per cent. Consolidated Bank Annuities, and the capital stock after the decease of the respective annuitants to their children.

By another codicil, dated the 15th of August, 1808, attested by two witnesses, he revoked two legacies of 1000*l.* each; and directed, that the same shall sink into his residuary estate, disposed of by his said Will; and he gave another annuity of 20*l.* to be paid by his executors out of stock standing in his name (as in the former codicil) and after the decease of the annuitant directed, that the capital stock, from or out of the dividends of which the said annuity shall have been paid, shall sink into and become a part of his residuary estate: and thenceforth become divisible amongst the persons entitled to such residuary estate by his Will.

By another codicil, dated the 26th of March, 1809, with two witnesses, he gave other legacies, and to Frances Catchmayd in addition to the other bequests to her an annuity of 300*l.* to be paid to her during the term of her natural life; and directed his executors to set apart or purchase in the 3*l.* per cent. Consolidated Bank Annuities a sufficient sum in stock to answer the payment of the said annuity during the life of the said Frances Catchmayd; which stock upon her decease is to fall into the residue of his personal estate.

The testator died on the 23d of June, 1809. The Will was filed by the executors to have the Will established and the accounts taken. The testator left surviving him the defendants Susanna Ann Goodwin, his only child, his * nephew and niece [* 160] John Kington and Susanna Bayly, and his great-niece Urania Mary Ann Kington, the daughter of his deceased nephew Peter Kington. The question arose upon her claim under the third codicil of a share of the residuary fund, including the produce of the real estate, directed by the Will to be sold: the daughter claiming, as heir at law, the produce of the real estate as undisposed of.

Sir Samuel Romilly and Mr. Benyon, for the Heir at Law.—The effect of this devise in trust to sell is a conversion for a particular purpose only; and, as far as that purpose fails, there is a resulting trust of the interest, that has lapsed, for the heir, according to *Ack-*

royd v. Smithson (1) and the other cases, referred to in *Sheddon v. Goodrich* (2). If the residuary clause can be construed as not applying to the property, appropriated to that particular purpose, for which the real estate is directed to be sold, the other question would not arise: the heir at law being also the sole next of kin: but, if that clause cannot be so limited, the question is, whether the unattested codicil can pass the interest in the real estate. That instrument cannot have any effect upon the real estate, or its produce, arising from a sale, directed for a specified purpose, and not in any other manner converted into personal property. The Statute of Frauds (3) cannot be thus repealed. The effect of an unattested instrument upon a fund, arising from the conversion of real estate, directed by a Will duly executed, as extending only to debts and legacies, was fully considered in *Habergham v. Vincent* (4), [* 161] and *Rose v. Cunynghame* (5). This Will, *so far from a conversion out and out to all intents, has marked expressions, clearly denoting a special, limited object.

Mr. Hart, Mr. Leach, and Mr. Seton, for the Defendant Urania Mary Ann Kington.—The true construction of this Will is, that at the testator's death his real estate was by the effect of his Will converted into personal for all purposes whatsoever; not merely making it subservient to a partial, limited, purpose; subject to which it was to remain real. The consequence is, that in the event, that has happened, it was competent to the testator by an unattested codicil to dispose of that, so existing as personal property. Upon the whole of this Will, considered altogether, and regarding the testator's general scheme, his principal object was, that at his death his whole real estate was to be acted upon, and dealt with, not as personal estate in the extended sense of that expression, but as 3*l.* per cent. Bank Annuities. He shows an anxiety to relieve his trustees from every charge, that might impede the general purpose of converting his property into 3*l.* per Cents. excluding any inference in favor of the heir.

There are only two cases, directly applicable, *Mallabar v. Mallabar* (6), and *Durour v. Motteaux* (7): both recognized by the Lord Chancellor in *Sheddon v. Goodrich* as the law of the Court; and much stronger in favor of a resulting trust for the heir, from a merely partial purpose. The Will in *Mallabar v. Mallabar* was as nearly as possible parallel to this. The conversion being complete by the effect of the Will, the question is, whether it is not competent to the testator to act upon the property, so converted, by a [* 162] testamentary instrument, not *having three witnesses. It

(1) 1 Bro. C. C. 503; see the notes, *ante*, vol. i. 45, 204.

(2) *Ante*, vol. viii. 481.

(3) Stat. 29 Ch. II. c. 3.

(4) *Ante*, vol. ii. 204.

(5) *Ante*, vol. xii. 29.

(6) For. 79.

(7) 1 Ves. 320.

is not disputed, that, having charged the real estate with debts by a Will duly attested, he may exhaust the whole by debts afterwards contracted; and that has been extended to legacies, given afterwards by an unattested instrument, legacies being once well charged by a Will duly executed upon *Brudenell v. Boughton* (1), *Hannis v. Packer* (2), and Lord Mansfield's opinion in *Windham v. Chetwynd* (3). There is no substantial distinction between that and the case of residue; though the Lord Chancellor in *Sheddon v. Goodrich* intimates, that no decision has gone to that extent. The residue bequeathed is but a legacy, originally undefined, but becoming defined by withdrawing what is taken out of it; and whether the subject of the bequest is ascertained by the amount in figures, or by the proportion it bears to the whole, as in this instance one fourth, can make no difference. The principle, stated by Lord Alvanley in *The Attorney General v. Ward* (4), that, the charge being once well made, another legatee may be substituted by an unattested Codicil, reaches this case. In *Sheddon v. Goodrich* the Lord Chancellor expresses an opinion, that, the conversion having taken place, an unattested instrument would pass the surplus, if the testator considered the whole as personal property, and intended to pass it as such under those terms. This residuary clause is expressed in terms, legally and technically applicable to personal property: the testator, clearly meaning to pass the absolute interest, does not use any terms of limitation; taking care to insert the necessary words of limitation, when giving real or leasehold estate; clearly showing, that he was aware of the distinction; and meant a conversion out and out. * The conclusion is, that this [* 163] legatee is well substituted by the codicil in the room of her deceased father as to the share, which would have lapsed.

Sir Samuel Romilly, in reply.—The Lord Chancellor in *Sheddon v. Goodrich* must have meant such a conversion of real estate, that it would no longer go as such, but would as personal property go to the next of kin; as if the testator had expressly said, that, if he should not dispose of it, there should be no resulting trust for the heir. Here is no more conversion than there was in that case; which cannot be distinguished: a conversion for the mere purpose of paying legacies and annuities, expressly given to persons named. This Codicil therefore can have no effect upon that, which arose from the real estate. The Court has declared, it will no farther extend these cases, disregarding the provisions of the Statute; and *Sheddon v. Goodrich* is a clear, direct, decision, that the case of a residue does not fall within the same reasoning, which has been applied to particular legacies by analogy to the case of debts. The Court is now required to extend it to a new case always considered perfectly distinct from that of a pecuniary legacy: a distinction par-

(1) 2 Atk. 268.

(2) Amb. 556.

(3) 1 Burr. 423.

(4) *Ante*, vol. iii. 327.

ticularly marked in *The Attorney General v. Ward*. From the instant of Peter Kington's death this was so much real estate, not affected by any Will the testator had made; and the consequence is clear, that no subsequent act, but the execution of a Will, with three witnesses, could deprive the heir of the benefit of that resulting trust, according to *Ackroyd v. Smithson* (1).

[* 164] 1811, July 15th. *The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The first thing to be considered is, what would become of the share of the produce of the real estate, intended for Peter Kington; supposing the codicil had not been made: then it is to be seen, how far the codicil can affect that share. The direction to sell the real estate is in this case, as it was in *Sheddon v. Goodrich* (2), in the first instance absolute; and without any specification of the purpose, for which the sale was to be made. The purpose however distinctly appears in the immediately subsequent clause; which declares the trust, upon which the purchase-money of the real estate was to be held. It was to be invested in 3l. per Cents., for the purpose of “answering and paying and contributing towards answering and paying the several annuities and legacies by this my Will given and bequeathed, and to, for, or upon, no other use, intent or purpose whatsoever.”

It is however said, that, though the testator has here expressed only a particular purpose, there are passages in the Will, which import, that the real estate was to be converted for all intents and purposes into personal. He says, after giving several annuities, “I direct, that the whole of the before mentioned annuities shall be charged upon my capital stock or fund in the 3l. per cent. Consolidated Annuities; and when and as the several annuitants die, that so much of the capital as was set apart for such annuity, except otherwise disposed of by my Will, shall immediately after the death of such annuitant sink into and become a part of my residuary personal estate; and be transferred by my executors to the several persons by this my Will entitled to such my residuary personal

[* 165] estate.” By * another clause, after giving several legacies, he says, “I also direct, that the whole of the before-mentioned legacies shall be payable out of my aforesaid capital stock or fund of 3l. per cent. Consolidated Bank Annuities, at the end of one year after my decease; and also in case any of the said annuitants or legatees shall die in my life-time, that the stock or fund, which would have been appropriated for the payment of such annuitants or legatees respectively, shall sink into my residuary personal estate; and be transferred on my decease to the persons entitled to such estate by this my Will, save and except where the sums appropriated or given to such annuities or legatees are after their several and respective deaths otherwise hereinbefore disposed of.”

In order to draw any argument from these clauses, it must be first

(1) 1 Bro. C. C. 503.

(2) *Ante*, vol. viii. 481.

assumed, that, when he speaks of his capital 3l. per cents. he means not the stock, belonging to himself, and which in other parts of the Will he states to be standing in his name, but that future stock, to be purchased with the produce of his real estate after his death, in the names of his trustees. I think, there is no color for that; but, supposing it otherwise, it would come to this only; that he had directed his real estate to be converted, not only for the annuitants and pecuniary legatees, but also for his residuary legatees under that his Will: so that at the utmost it would be a conversion for the purposes of his Will. In *Ackroyd v. Smithson* (1), and other cases of that class, there was no doubt as to the complete conversion for all the purposes of the Will; and, if the several legatees had lived, they would have taken among them the whole produce of the real estate, as personal: but the question was, whether *there [*166] was a conversion for the benefit of any person, who could not claim under the Will; viz. for the next of kin; and it was held, that there was not. In the case of *Collins v. Wakeman* (2) there was an express declaration, that the money, arising from the sale of the real estate, should be considered as personal property: yet the portion of it, which turned out to be eventually undisposed of, was held to belong to the heir.

Considered with reference to the Will therefore, the claim of the heir to the share, lapsed by the death of Peter Kington in the testator's life, could not possibly be disputed. The authorities, to which I have referred, have decided, that the next of kin could not take it. The other residuary legatees could have no claim; as they were tenants in common of their proportions without benefit of survivorship.

The question then is, whether the unattested codicil of the 2d of February, 1808, has disposed of his share. I have always understood, that an unattested Will or Codicil could have no operation upon the land, or the produce of the land. There are indeed some expressions in the Report (3) of *Sheddon v. Goodrich*, which seems to imply, that a testator may consider his real estate as by his Will thrown into personalty so that he could act upon it, as if it was personal property: but I cannot conceive any such case; that a person can enable himself to dispose of his real estate, or its produce, by any other sort of Will than the law requires to pass land. That question however does not arise here; as here was no conversion, except for the purposes of his Will; and therefore *Sheddon v. Goodrich* is a direct authority against the operation of this codicil in favor of the person, to *whom the benefit of the lapsed share of: [*167] the residue is by that codicil given.

An attempt was made to raise an argument from the cases of

(1) 1 Bro. C. C. 503.

(2) *Ante*, vol. ii. 683.

(3) This alludes to an error in the abstract in the margin, 481, corrected in this edition; see 493, 4.

Brudenell v. Boughton (1) and *The Attorney General v. Ward* (2), and it was said, that, if a legacy, charged upon land, can be given by an unattested codicil, why not likewise a part of the produce of the land? To that I answer, that the line has always been drawn between legacies, charged upon the land as an auxiliary fund, and a portion of the land itself, or the produce of the land, when directed to be sold. The principle of these cases may perhaps be disputable: but the Judges, by whom they were decided, did expressly declare, that, with regard to a charge upon land only and by consequence to the produce of it, a devise cannot be made or altered but by a Will, executed according to the Statute.

My opinion therefore is, that the codicil in this case has no effect whatsoever upon the lapsed share, intended for Peter Kington: but it belongs to the heir at law.

1. As to the resulting trust which arises in favor of an heir at law, whenever any part of his ancestor's real estate, or the produce of such real estate, eventually proves not to have been effectually disposed of, see, *ante*, notes 2, 3, to *Kidney v. Coussmaker*, 1 Ves. 436.

2. It is indispensably requisite to the validity of a devise of land, or of the produce of land, that the testator's will should be attested conformably to the provisions of the Statute of Frauds: but it does not seem necessary that the execution of a power affecting real estate, in the nature of a charge only, and not passing the land, should, in all cases, be attested by three witnesses; and, when a general charge, on real estate, of all the testator's debts and legacies, has been incorporated in his duly attested will, debts afterwards contracted, or legacies subsequently given by unattested codicils, will be well charged: see note 4 to *Habergham v. Vincent*, 1 V. 68.

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LOWES v. HACKWARD.

[1811, JULY 31; AUGUST 1.]

COPYHOLD conveyed on trust to sell: the money to be deemed part of his personal estate, and in trust for such Uses as he should by deed or Will appoint; and in default for his right heir. A Will, executed on the same Day, but not referring to the deed, directing a sale of particular property, and disposing of the personal estate in general terms, held not applicable to the estate, conveyed by the deed; which went to the heir; no Use being by the subsequent instrument declared; if the estate was converted.

THOMAS HACKWARD, being seised of customary lands at Wear-dale in the county of Durham, by indentures, dated the 30th of October, 1800, conveyed to his nephew Thomas Hackward and John Lowes, their heirs and assigns, to hold unto and to the use of them, their heirs and assigns, upon trust to permit him, Thomas Hackward the elder, to have and to take the rents, issues, and profits, during his life; and from and immediately after his death, as to a part,

(1) 2 Atk. 268.

(2) *Ante*, vol. iii. 327.

called the Low Field, in trust for his niece Sarah Lowes, to hold unto and to the use of her, her heirs and assigns for ever, paying the ancient and customary rent for the same; and as to all other his customary premises thereby conveyed, upon trust to sell; and that the money to arise by such respective sale and sales, and the clear, yearly, rents and profits, which might arise from the said several estates and premises, should be deemed, become, and be taken by the said Thomas Hackward, the nephew, and John Lowes, their heirs and assigns, as part of the personal estate and effects of the said Thomas Hackward the elder; and that the same should be in trust and to and for such use and uses as the said Thomas Hackward the elder should in and by any deed or deeds, writing or writings, under his hand and seal, attested by two or more credible witnesses, or by his last Will and Testament in writing, to be by him signed, sealed, and published, and declared, in the presence of three or more witnesses, direct, limit, give, bequeath, devise or appoint, of and concerning the same; and in default of such direction, declaration, gift, devise or bequest, then that the same premises *should be in trust for the right heirs of the [* 169] said Thomas Hackward the elder, his, her or their heirs or assigns for ever.

Thomas Hackward the elder, by his Will, of the same date, duly executed, and attested by three witnesses, gave certain leasehold estates, and 200*l.* secured on a turnpike, to Hackward the nephew, and Lowes, in trust to sell; and he gave and bequeathed all his personal estate and effects whatsoever, except as hereinafter mentioned, to them, their executors, administrators, and assigns, upon trust as soon as convenient after his death to call in and receive all debts; and to place the money out at interest upon good real or personal securities, and to receive the interest, &c. and pay, apply, and dispose of the interest money in manner following; and he gave the interest money of all his principal sums, so to be received by his said trustees, their executors, or administrators, and put out on real or personal security, as aforesaid, unto his sister Mary Henderson, the Plaintiff Sarah Lowes, and his nephew Thomas Hackward, for their natural lives, equally to be divided amongst them, share and share alike; with a direction upon the respective deaths of each to call in, and pay and apply, one third of the principal among the sons and daughters of each, share and share alike.

The testator died on the 5th of November, 1803; leaving his nephew Thomas Hackward, his heir at law, and the Plaintiff Sarah Lowes and the Defendant Mary Henderson, his only sister, surviving him.

The Bill prayed, that the deed may be declared a good conveyance of the customary estate, upon the trusts therein expressed; and that the beneficial interest in the estates, or the money to arise by the sale, may be *declared to have passed by the [* 170] bequest of the residue of the personal estate, contained in the Will.

composition of all the articles stated in the Bill; and as the payment in lieu of tithe of all hay, made and carried in and from any of such lands in the tenure of such occupier, be the quantity great or small, as well for two or more farms or tenements, as for one, the annual value of 1*d.*: also for every garden or field, sown with turnip seed, and for all turnips growing thereon, the like sum of 1*d.* without reference to the quantities thereof respectively growing, had, or taken by such occupier.

The Plaintiff by amendment abandoned his claim as to all the articles except hay and turnips; and having replied to the answer, the Defendant went into evidence in support of the *Modus* he alleged; producing a terrier under the hand of a former Vicar; and proving as exhibits at the hearing, the office copies of the Bill, Answer, and Depositions in a cause of *John v. William* (1), upon a Bill for tithes in the same parish.

[* 174] *Mr. *Richards* and Mr. *Lewis*, for the Plaintiff: Sir *Samuel Romilly*, Mr. *Bevan*, and Mr. *Heyes*, for the Defendant.

The MASTER OF THE ROLLS [SIR WILLIAM GRANT].—From the manner in which the Bill was amended after the answer, it is a little difficult to know what is in issue; and consequently what is the point to be determined. The Plaintiff first set forth his right as Vicar, to the tithes of a great variety of articles; and then states, that the Defendant had upon his farm all the enumerated articles; that the tithes were subtracted; and the Bill prays an account, and payment, of the value of the tithes subtracted. By amendment the state of his right is narrowed by striking out wood, potatoes, and agistment; and then his claim is to be entitled to tithe of hay, mills, calves, pigs, colts, &c.: but when he proceeds to state what titheable matters the Defendant had, he strikes out all except hay and turnips. In that state of the record I wish to know whether I have any thing to determine but the right to the tithe of hay and turnips.

It was admitted at the Bar, that the Plaintiff's claim was reduced to those two articles.

The MASTER OF THE ROLLS [SIR WILLIAM GRANT].—A *Modus* is alleged as to both. As to that for hay, on comparing the manner in which it is laid, with that in *Bennet v. Read* (2), there [* 175] is no distinction between *them. In each case a custom is alleged in the parish for every occupier to pay a particular sum in lieu of all tithe. The quantity is therefore immaterial. If that case is to be distinguished from *Traves v. Oxton* (3), so is this in the same manner: if those cases are not to be distinguished, *Bennet v. Read* being the more recent case, I ought to follow it;

(1) In the Court of Exchequer, 1691.

(2) 1 Anstr. 322.

(3) 1 Anstr. 308; Gwil. 1066.

and upon that authority to hold that this is a good *Modus*: but the Vicar is entitled to an issue, if he chooses.

As to turnips, the *Modus* is bad; as that is an article of too recent introduction into this Country to be the subject of immemorial usage.

An Issue was afterwards directed upon the application of the Plaintiff (1).

See note 2 to *Blackburn v. Jepson*, 17 V. 473.

MORISON v. TURNOUR.

[1811, August 2, 11.]

BILL for specific performance. Plea to the relief, and to the discovery, except (stating the particulars) of the Statute of Frauds, with an averment, that there was no contract in writing, signed, &c. unless the note in the bill mentioned can be so considered, and for Answer (as to the excepted particulars) admitting the note, &c. over-ruled, as tendering an immaterial issue (a).

Whether a note, written in the third person, "Mr. T. proposes," &c. (making an offer to purchase) being accepted, amounts to a contract in writing signed, within the Statute of Frauds, *Quære* (b).

Plea, supported by Answer, must also contain a denial generally by averment (c), [p. 182.]

"I, A. B. do make this my Will" equivalent to signature, and, if acknowledged before three witnesses, a good execution within the Statute of Frauds (d), [p. 183.]

THE Bill stated that the Plaintiff, being possessed of a leasehold house at Esher, employed George Crosby to sell it, with the furniture and fixtures, who entered into a treaty with the Defendant * for the sale, and the Defendant wrote and sent [* 176] the following note to Crosby:

"Mr. Turnour has again seen Esher Hill Cottage, and wishes to know, if the owner of the lease will take for lease, furniture, fixtures, &c. and the stock of the garden, in short for the whole place, as it now stands, 300*l.*, subject to Mr. Turnour's attorney approving of the tenure, by which it is held. The woman, who shows the

(1) See the final decisions against the bay-modus, referred to in the note, *ante*, vol. xvii. 478.

(a) The point of a plea should be such as is issuable, and also such as is material to delay, dismiss or bar the Bill; for if the issue tendered is immaterial, it can never finally dispose of the cause. Story, Eq. Pl. § 661, 762, 766, note.

(b) As to the effect of the insertion of the name in the body of an agreement, as a signature within the Statute of Frauds, see *ante*, note (a) *Coles v. Trecothick*, 9 V. 234.

(c) See *ante*, note (a) *Bayley v. Adams*, 6 V. 586; Story, Pl. § 665, 764.

(d) The Statute 1 Victoria, c. 26, § 39, has superseded all questions of this kind in England by expressly providing that the will shall be signed at the foot or end thereof. See *ante*, note (a) *Ellis v. Smith*, 1 V. 11.

house, says, that Dr. Morison has taken away, since the inventory was made, these articles: a chest of drawers, stair carpet, bed-rooms ditto, and all the window curtains, except that in the nursery. This, and the state of repairs, induces him to make the present offer. He will wish immediate possession, and to have the fruit and vegetables left on the premises. 6 York Street, Portman Square, 10th October 1810."

The Bill farther stated, that Crosby by a letter accepted the said terms on the part of the Plaintiff; and agreed, that the rent should commence from Michaelmas preceding. Crosby, on the 13th of October, by the Defendant's direction, sent the original lease and the assignments to his Solicitor; who returned them with the draft of the agreement; requesting, that it should be returned on Monday; and stating, that Mr. Turnour had appointed to meet Mr. Crosby on Tuesday to sign the agreement. The draft was returned accordingly; and the appointment assented to: but the Defendant did not attend; and afterwards declined signing the agreement.

The Bill prayed a specific performance.

The Defendant as to the whole of the relief, and as to [* 177] * the whole of the discovery, except, whether the Plaintiff did not authorise Crosby to sell the house, and write such letter, and receive the answer, as in the Bill mentioned, and whether such letter is not now, or was not lately, and when last, in the custody or power of the Defendant, pleaded in bar the Statute of Frauds (1); averring, that no contract or agreement, or note of such agreement, was in writing signed by the Defendant, or any person thereunto by him lawfully authorised, within the meaning of the Act, unless the note of the 10th of October, 1810, in the Bill mentioned can be so considered; and for answer to the rest of the Bill believes, that the Plaintiff authorised Crosby, &c. and admits writing the letter, and receiving the answer.

Sir *Samuel Romilly* and Mr. *Spranger*, in support of the Plea.—To meet the objection from the Statute of Frauds the agreement must be in writing, signed; and a mere note, written in the third person, cannot be considered an agreement with the requisite signature; which means the subscription of his name in testimony of his assent. Upon one species of instrument, a Will of personal estate, it has been held in the Spiritual Court, that the name in the beginning of the Will is a sufficient authentication of that instrument as the testator's Will: but what analogy has that? There is no signature required by Statute; and the case has not occurred of a devise, without any signature subscribed, but beginning with the written declaration of the deviser, that it is his Will, and three witnesses attesting that act.

In the case of *Stokes v. Moore* (2) the Court of Exchequer [* 178] intimate an * opinion, generally as to any instrument, that the name, if inserted in such a manner as to have the ef-

(1) Stat. 29 Char. II. c. 3.

(2) 1 P. Will. 771; Mr. Cox's note (1).

fect of giving authenticity to the whole instrument, in any part as well as at the end, would be a good execution within the Statute; putting, as, an instance, the formal introduction to a Will; but there is no such decision; and, if a loose note of this kind, in the third person, with no design to authenticate by signature what was written, can have this effect, the whole end of the Statute is done away. This paper, if it had been signed, can hardly be considered as a proposal, which, if accepted, would bind the party making it. It is rather an inquiry, previous to proposal; and the offer, spoken of in the latter part, must be taken with reference to the rest, as an offer, that he might be disposed to make; that 300*L*. is the utmost he will offer; and therefore inquiring previously, whether that offer would be accepted; as otherwise it would be useless to make it. Upon the construction of the whole note, that is the clear import: and not a binding engagement.

Mr. *Hart* and Mr. *Hall*, for the Plaintiff.—This plea is liable to objections of form: 1st, As attempting to cover the whole relief, but not the whole discovery, though incident to the relief. In the case of *Williams v. Olive* a demurrer to part of the discovery of pedigree and title, and to the relief, your Lordship held, that though the Defendant might have demurred to the whole discovery, yet having given part, he was bound to give the rest, and to plead to the relief; observing in answer to the objection, that he might subject himself to penal consequences, that he might protect himself from that by special demurrer. This is a sort of argumentative plea; putting hypothetically what ought to have appeared by positive averment; and the partial discovery *given is the very [* 179] thing that ought to have been denied by the assertion, that no agreement was signed. Where the plea might cover the whole, it is over-ruled by answering any part: *Blacket v. Langlands* (1). Another objection of form is, that the Defendant should point out the specific part, to the discovery of which he objects; and not, putting it as a plea to the whole of the discovery, with an exception, compel the Court to look through the whole Bill.

2d, As to the substance of this plea the form, required by the Statute, is complied with, and its objects secured, by evidence in writing, signed by the party; guarding against the fraud and perjury, to which parol transactions are liable; and the distinctions of this case are merely formal. The effect of this note is direct proposal, waiting only for acceptance to constitute agreement. That a mere letter will bind as an agreement, was held clearly in *Tawney v. Crouther* (2); and the effect of it is not destroyed by proceeding towards a more formal agreement. The name, as inserted in the beginning of this note, gives authenticity to every part of it equally as the subscription of a letter. The place, and manner, of signature, whether with the christian name, at length, abridged, or the mere

(1) 1 Anstr. 14.

(2) 3 Bro. C. C. 161, 318; *Forster v. Hale*, ante, vol. iii. 696; see the note, 713.

initial, are circumstances of little importance. Upon the clause of the Statute, regulating devises, which makes signing essential, this question has occurred; the devisor himself writing his Will, containing his name, with no signature subscribed, but sealing only, that is a good execution: *Lemayne v. Stanley* (1): not upon the [*180] ground, that *sealing is equivalent to signing; which occasioned a difference of opinion; but upon the name appearing in the Will. The result of all the authorities, concluding with *Stokes v. Moore*, is, that the signature, found in any part of an instrument, as the mark or token authenticating the whole, is sufficient.

Sir *Samuel Romilly*, in reply.—It was very difficult to frame a plea to this Bill. The question upon the record is, whether the paper, which the Defendant admits he has written, is binding within the Statute; meaning to insist, that the signature required is in the first person, with both names; and he has done no such act. This defence cannot be made by plea, if not in this form. This resembles those cases, where the Plaintiff, anticipating the defence, endeavors to get rid of it, setting up circumstances in answer; as upon the plea of a stated account (2), a release, or award: in such cases the plea is not over-ruled by the answer; which is essential to support the plea, and this is a plea of the same nature as those. The Bill, stating the particular writing alleged to amount to a contract, does not proceed to assert, that there was no other written agreement, which would have let in a demurrer.

A man, thus describing himself in the third person, has never been decided to have signed within the Act of Parliament; which requires a signature as attesting what he has written. It is not necessary to sign it as an agreement: but he must sign. In the instance of the Will, the name, though in the beginning, authenticated the whole instrument as that, by which the testator meant to abide as [*181] his Will; which is very different from a name *occurring in the third person. *Lemayne v. Stanley* (3), as to the second point, that sealing is equivalent to signing, has certainly been over-ruled: and the case has never yet occurred of a testator calling in witnesses to see him begin, instead of conclude, his Will: nor is so singular a mode of execution likely to occur. The Court will attend to the great mischief of departing farther from the provisions of this Statute, and of encouraging suits for specific performance upon loose memorandums, and subjects of small value.

Aug. 5th. The Lord CHANCELLOR [ELDON].—It is extremely clear, that, if this letter and the answer to it do not amount to an agreement, taking this case out of the Statute, the subsequent transactions have not that effect. The question therefore is, whether this

(1) 1 Lev. 1; see *Grayson v. Atkinson*, 2 Ves. 454; *Ellis v. Smith*, ante, vol. i. 11.

(2) Mitf. 208.

(3) 1 Lev. 1.

letter, which cannot be represented otherwise than as an offer, is to be taken as an agreement or memorandum in writing, signed by the Defendant within the Statute; having been accepted by the answer, that was sent. The Defendant, putting his defence upon the record in this way, pleading the Statute to the whole relief, and to the whole discovery, with the exceptions stated, and an averment, that no contract or agreement, &c. was in writing, signed by the Defendant, unless this note can be so considered, does not in this part admit or deny, that the letter is his hand-writing; but proceeds to state, by way of answer, his belief, that the Plaintiff did authorise Crosby to deal; and admits, that he did send the letter, and receive the answer.

To this plea two objections are taken: one of form, * the other of substance; and as to the former, I think, it [* 182] is vicious in form. If a bill for specific performance states the agreement generally, with no representation, fixing it as in writing, or not, as that general averment may be understood of an agreement either in writing, or not, though a plea of the Statute, with an averment, that there was no agreement in writing, has rather the appearance of an answer, I have understood, that it has been always admitted in that form (1): but, if the bill states an agreement in writing, and seeks nothing but the execution of that agreement, a plea, that there is no agreement in writing, is no more than so much of an answer. This bill seeks the execution of the agreement, contained in the letter set forth and the answer to it; and the plea is, that there is no agreement in writing, unless that letter is an agreement in writing. In many instances (2) a plea, supported by an answer, must itself contain something of denial in a general way of what is stated by the bill, and afterwards denied by the answer. Here the Defendant proceeds to aver, that there is no agreement in writing, unless this note is such; neither admitting, nor denying, that it is his writing. The consequence is, that, if the plea is found to be true, the Court has a record in this state: the Defendant alleging by this plea, that there is no agreement in writing, unless this note is such agreement: the plea therefore stating precisely what the bill states. The Court cannot upon argument of the plea put an end to the cause; as, if it is allowed, still judgment will be necessary upon the question, whether that letter and the answer to it amount to an agreement in writing.

As to the substance of this plea, I fully agree, that this * Court has gone much farther than a wholesome attention [* 183] to this Statute with reference to the specific performance of agreements will justify; but upon this particular point has not gone farther than Courts of Law: what is the construction of the Statute, what within the legal intent of it will amount to a signing, being the same question in equity as at law. Upon that point, this

(1) See *Bayley v. Adams*, ante, vol. vi. 586.

(2) *Bayley v. Adams* ante vol. vi. 586; see 596, and the note.

Court professing to follow the law, if a new question arises, I would rather send a case to a Court of Law.

Aug. 6th. The parties having expressed a wish to have the Lord Chancellor's judgment upon the question, his Lordship offered to give his opinion, if they chose to have it: but on this day the Defendant's Counsel declined it; having just received information that the estate had been put up to sale; which they considered an abandonment.

The Lord CHANCELLOR.—Though I am ready to give my opinion, I by no means press it upon the parties; considering this as a case, that has never been determined as to land. I observe, Lord Hardwicke in *Grayson v. Atkinson* (1), commenting upon *Lemayne v. Stanley*, intimates a very clear opinion, that if the testator with his own pen says "I, A. B. do make this my Will," &c. and acknowledges that before the witnesses, that is a good execution; and that the case in *Levinz* cannot be sustained, unless you add one of two circumstances; either that the witnesses were present, when he was writing the Will; which, Lord Hardwicke justly observes, is not a natural presumption; or, if they were not present; that he acknowledged it to be his writing, when he called them in to attest [* 184] it; certainly *expressing his opinion, that such acknowledgment would do (2).

The plea was therefore over-ruled upon the formal objection (3).

1. LETTERS may constitute such an agreement for the sale and purchase of a real estate, as a court of equity will see executed; but the terms of the contract must appear to have been conclusively and mutually agreed upon: see, *ante*, note 1 to *Foster v. Hale*, 3 Ves. 696; and note 9 to *Coles v. Trecothick*, 9 V. 234.

2. Where a bill contains charges which, if true, would avoid a plea put in by the defendant, those charges must be denied, not only by averments in the plea, but also by answer in support of the plea: see note 2 to *Jones v. Pengree*, 6 V. 580; and the notes to *Bayley v. Adams*, 6 V. 586.

3. Lord Eldon observed, in *Coles v. Trecothick*, 9 Ves. 248, that the legislature never used stronger language than when, by the Statute of Frauds, the signature of a testator was declared necessary to his will, disposing of lands; and that without it the instrument should be declared null and void to all intents and purposes. His lordship added, if notwithstanding the terms of this enactment, it can be held, that where a testator begins one simultaneous act, thus—"I, A. B., do make this my will," &c. though there is no signature subscribed, yet the will, if attested by three witnesses, shall be good; it would be difficult to say that such a signature is sufficient in a will devising lands, but would not be a sufficient signature to constitute an effectual agreement as to lands, when the very same form was used in an instrument, the whole of which was simultaneous, and which comprised the whole of the terms.

(1) 2 Ves. 454.

(2) *Ellis v. Smith*, *ante*, vol. i, 11; see the note, p. 17.

(3) *Ante*, *Bowers v. Cator*, vol. iv. 91, and the note, p. 96.

THOMAS v. OAKLEY.

[1811, August 2.]

THE jurisdiction against Waste by Injunction and Account applied to Trespass, by exceeding a limited right to enter and take stone from a quarry; being a destruction of the inheritance; as in the case of timber, coal, &c.; and the distinction between Waste and Trespass therefore disregarded (a).

Formerly, before Injunction was applied to the case of Trespass, upon the death of the party an account was given: the Trespass dying with the person, [p. 186.]

THE case, stated by this bill, was, that the Plaintiff was seised in fee-simple of an estate, in which there was a stone quarry; and the Defendant, having a contiguous estate, with a right to enter the Plaintiff's quarry, and take stone for building and other purposes, confined to a part of his estate called Newton Farm, had taken stone to a considerable amount for the purpose of using it upon the other parts of his estate; praying an injunction and account.

To this Bill the Defendant demurred.

Mr. Hart and Mr. Horne, in support of the demurrer, relied on the distinction between waste and trespass; this being a mere trespass; and the account too trifling to change the jurisdiction.

Mr. Benyon, for the Plaintiff.—The course of modern authority is to afford assistance in these cases of coal-mines, timber, &c.; to prevent irremediable mischief: an injury which damages could* not compensate. In *Mitchell v. Dors* (1) and many [* 185] other cases, your Lordship, following Lord Thurlow, gave relief; giving the injunction, where an action of trespass might be maintained; and the account follows the injunction; to prevent multiplicity of suits.

The Lord CHANCELLOR [ELDON].—The case has this specialty: the Bill admits the Defendant's right of entry into this quarry, and of taking stones for all the purposes of Newton Farm; though, if he takes for any other purpose, undoubtedly an action would lie: but is there any distinction between this case and that of a coal-mine? Is not this taking away the very substance of the estate just as much as in the case of a coal-mine? After the decisions, that have taken place, this demurrer cannot be maintained. The Plaintiff represents himself to be seised as tenant in fee of an estate, in which there is a stone-quarry, that is parcel of the estate. He then states, which upon this occasion I must take to be true, that the Defendant, having an estate in his neighborhood, consisting of Newton Farm, among other lands, as owner of that farm has a right to enter into the quarry for the purpose of taking stone, as far as he has occasion for building and other purposes upon that farm: but the Plaintiff represents, that the Defendant has taken stone, for the

(a) As to the practice of issuing injunctions in cases of trespass, on the principle of irreparable mischief, see *ante*, notes (b) and (c) *Hanson v. Gardiner*, 7 V. 305; note (a) *Mitchell v. Dors*, 6 V. 147.

(1) *Ante*, vol. vi. 147; see the note.

purpose of application, not upon Newton farm only, but also upon his other estates, and to a very considerable amount. That is trespass beyond all doubt, and not waste; as there is no such privity between the parties as would make it waste. His entry for the purpose of taking stone with reference to Newton Farm is lawful: but, if under color of that right he takes stone for the enjoyment, not of his farm only, but his other estates, his entry to that extent * is unlawful, and his act a trespass; and, if it is settled, that the Court will interfere by way of injunction and account, this demurrer cannot prevail.

The distinction, long ago established was, that, if a person, still living, committed a trespass by cutting timber, or taking lead ore, or coal, this Court would not interfere; but gave the discovery; and then an action might be brought for the value discovered: but, the trespass dying with the person, if he died, the Court said, this being property, there must be an account of the value; though the law gave no remedy (1). In that instance therefore the account was given, where an injunction was not wanted. Throughout Lord Hardwicke's time, and down to that of Lord Thurlow, the distinction between waste and trespass was acknowledged: and I have frequently alluded to the case, upon which Lord Thurlow first hesitated: a person, having a close demised to him, began to get coal there; but continued to work under the contiguous close, belonging to another person; and it was held, that the former, as waste, would be restrained: but as to the close, which was not demised to him, it was a mere trespass; and the Court did not interfere: but I take it, that Lord Thurlow changed his opinion upon that; holding, that, if the Defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief, to which in Equity he was entitled. The interference of the Court is to prevent your removing that, which is his estate. Upon that principle Lord Thurlow granted the injunction as to both. That has since been repeatedly followed (2); and whether it was trespass under the color of another's right actually existing, or not.

[* 187] * If this protection would be granted in the case of timber, coals, or lead-ore, why is it not equally to be applied to a quarry? The comparative value cannot be considered. The present established course is to sustain a Bill for the purpose of injunction, connecting it with the account in both cases; and not to put the Plaintiff to come here for an injunction, and to go to law for damages.

The Demurrer was over-ruled.

SEE note 3 to *The Mayor of London v. Bolt*, 5 V. 129; and notes 1, 2, to *Hanson v. Gardiner*, 7 V. 305; the note to *Smith v. Collyer*, 8 V. 89: and the note to *Hale v. Thomas*, 7 V. 589.

(1) *The Marquis of Lansdown v. The Marchioness of Lansdown*, 1 Madd. 116.

(2) See *Mitchell v. Dors*, ante, vol. vi. 147.

HALLETT v. BOUSFIELD.

[1811, August 8.]

LIEN for general contribution to individual loss by property thrown overboard for the safety of the ship, under the right of the Master to require security, not extended to an Injunction against delivering the cargo, receiving the freight, and parting with any share of the ship. The mode of adjustment not confined by usage to Arbitration (a).

THE ship *Ocean*, lately returned to this Country from Buenos Ayres, having met with tempestuous weather, it became necessary for the safety of the ship to lighten her by throwing part of the cargo overboard; and accordingly a quantity of bark, the property of the Plaintiff, was with other goods, belonging to other persons, thrown overboard.

The Plaintiff moved for an injunction to restrain the master and ship-owner from delivering any part of the cargo, and receiving the freight, or parting with any share of the ship; insisting on a lien for contribution.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Wilson*, for the Plaintiff, relied on the general law, as laid down by Mr. *Abbott* (1), * as supporting the right to contribution; referring to [* 188] *Shepherd v. Wright* (2); in which case the decision was against the Plaintiff on the ground, that the destruction of his property was not strictly for the benefit of those, who were called on for contribution.

Mr. *Leach* and Mr. *Agar*, for the Defendant.—This Plaintiff is not the only sufferer: the property of many other persons also being destroyed; who are equally entitled to contribution. A general ac-

(a) In cases of general average, the master and owners may retain all goods of the shippers, until their share of the contribution towards the average is either paid or secured. *Abbott*, Shipping, 361, 362; *Simonds v. White*, 2 B. & C. 805, 811; *Scarfe v. Tobin*, 3 B. & Adolph. 523, 529; *The Hoffnung*, 6 Rob. 383; 2 Brown. Adm. Law, 201; *Stevens*, Average, 50; *Pothier on Maritime Contracts*, by Cushing, p. 76, n. 134.

It seems that there is no exception to this general rule in favor of the United States, or any other government or sovereignty, although there may be cases of contracts, where liens on the property of government do not attach, as on that of private persons. *United States v. Wilder*, 3 Sumner, 308; 2 Phillips, Ins. 157 to 161.

Each individual is undoubtedly entitled to sue for the amount of his share when adjusted; but the English practice usually is, in the case of a general ship, where there are many consignees, for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average when the same shall be adjusted. 3 Kent, Com. (5th ed.) 244. The captain may make the giving of the average bond a condition of the delivery, and it is held to be a reasonable condition in support of a right founded on commercial usage. *Cole v. Bartlett*, 4 Miller, 130.

The application in the present case for an Injunction is noticed, 2 Phillips, Ins. 585.

(1) Abb. Ship. 354.

(2) Show. Parl. Cas. 18.

count is therefore necessary. The course at Lloyd's in these cases is to refer it to merchants, to ascertain, what is to be paid to each freighter; and for that purpose the usual bond has been prepared; and signed by all the freighters, except the Plaintiff. The general right to contribution, and to pray it in a Court of Equity, is not disputed: but upon what authority can the Plaintiff lock up all this property, until the account is taken: an inconvenience of such extent, that, if authorised by the law, it ought not to remain unredressed by the Legislature. The Plaintiff must establish a lien for every freighter upon the ship and the rest of the cargo: but how can the doctrine of lien, the right of a party, having property in his possession, to retain it, until his demand is satisfied, be applied to the interest of a freighter; and has no possession; the whole being in possession of the owner? Mr. Abbott says, it is usual for those, who seek contribution, to file a bill, or bring an action; but cites no authority for this lien; which is altogether novel and unfounded; and may produce great inconvenience from the perishable nature of the cargo, and the possible event of a bankruptcy, while the Defendant is prevented from receiving the freight due.

[* 189] * Sir *Samuel Romilly*, in reply.—The Plaintiff desires no more than that at the present moment, when nothing is settled respecting contribution by the different freighters and the owner, the Court will not permit those, who have the property, liable to contribution, by parting with it to remove his only security. Certainly there is no authority establishing this lien upon the remainder of the cargo: but it is contended, that the Master is justified in delivering the cargo to all the different consignees without taking any security for contribution? The proposition must go to that extent: but the general commercial law binds him, before delivery of the goods to the consignees, or holders of bills of lading, to take security from them for contribution to a loss, thus occasioned by a partial sacrifice for the general safety; providing for the adjustment at a future time of that equal contribution, which natural justice demands, but which cannot be made at the time. The text of this law (1) has been universally adopted. Mr. Abbot (2) states, that by the Civil Law the Master was required to take care to have the contribution settled, and to receive the sums to be contributed, and pay them over to the losers; and might sue or be sued for them; or might retain the goods for the sums to be contributed by their proprietors. As to the mode of adjustment, he does not speak of arbitration; but says, that in case of dispute the contribution may be recovered either by a suit in equity, or an action at law, instituted by each individual, entitled to receive, against each party, 'who ought to pay, for the amount of his share; and in the case of a

(1) *Lege Rhodia cavetur, ut si levandæ Navis Gratia Jactus Mercium factus sit, omnium Contributione sarciantur quod pro omnibus datum est.* Dig. 14, 2, 1.

(2) Abbott, Ship. 373.

general ship, where there are many consignees, it is usual for the Master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average when the same shall be adjusted.

These passages strongly support the lien upon the Commercial Law, requiring the Master not to part with the cargo, until he has taken security for the loss, when adjusted: whether by arbitration or a suit in equity is left uncertain; and this results necessarily from the manner in which property of this kind is disposed of; passing by Bill of Lading; parcelled out in different shares, and bills given upon their credit to various persons, whom it may be very difficult to find, when the goods are gone. One mode suggested, by action, would be very inconvenient: but that this is a proper subject for a suit in equity is not disputed; though the injunction is resisted.

The Lord CHANCELLOR [ELDON].—This is a question of great importance, as connected with the convenience or inconvenience, which may be the consequence. It is impossible for me to say here, that parties are obliged to refer such claims to arbitration: neither will any principle justify the administration of law and equity according to the usage of Lloyd's coffee-house. It seems to me also, as well as I recollect the text-law upon this subject, that in such case there is a lien upon the goods of each freighter for contribution and average in some sense: that is, the Master is not bound to part with any of the cargo, until he has security from each for his proportion of the loss: but there is no authority, that on the ground, that he has a lien to the extent of entitling him to call on every person to give security for the amount of their average when it shall be adjusted, every owner of a part of the cargo can compel *the Captain to [*191] do so; and it strikes me, upon the short time I have had to consider it, that is a length the Plaintiff cannot reach. The Defendant, it is true, is a trustee for others: but the nature of the trust is regulated by the practice; and there is no instance of an action or a suit in equity to effectuate this lien otherwise than through the right of the Master to take security: that practice ascertaining the true nature and extent of the lien. In the case of *Shepherd v. Wright* (1), though the Bill was dismissed, the Court certainly meant to maintain the jurisdiction by personal process to compel the other owners to make contribution. As there is no trace of authority upon it except that case, I cannot without farther consideration represent myself as master of the subject: but the strong inclination of my opinion is, that this lien cannot be carried farther than I have stated. The bond, that has been prepared, is only for such average as shall be established by arbitration. They have no right to say, it shall be tried in no other way: but there is no doubt, that the obligee in the bond would be a surety for the Plaintiff; and that would bring it

(1) Show. Parl. Cas. 18.

back to the question, whether he is entitled to have the bond to himself, or to the captain for him.

No Order was made.

THE principle of general average, in the commercial sense of that term, is, that all whose property has been saved by the sacrifice of the property of another, shall contribute to make good his loss; this doctrine is of very ancient date, and of universal reception among commercial nations. The obligation to contribute may, however, be limited, qualified, or even excluded, by the special terms of a contract: but, whenever contribution is due, the master of the vessel cannot be compelled to part with the possession of goods, until the sum contributable, in respect of them, shall be either paid or secured to his satisfaction: *Simonds v. White*, 2 Barn. & Cress. 811. But this *lien*, it seems, is personal to the Master, and does not belong to the freighters, who are entitled to contribution: though, in the case just cited, it was observed by Abbott, C. J., that, as the master *may*, certainly, in every case, exercise his power of detention for his own safety, so there may be cases in which he ought to exercise it for the safety of others, who, by this proper interference on his part, may be spared the expense and delay of actions and suits. And Sergeant Marshall, in his learned treatise on Insurance (vol. 2, p. 544) conceives, that it is the positive duty of the captain, when the goods he has on board are liable to contribution, to detain those goods till the contribution shall be made; and that, if he neglect this duty, an action will lie, either against him or against his owners, should that course be thought to offer a better remedy than an action, or a bill in equity, against each person liable to contribute. All loss, of whatever nature, which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo, come within general average; and must be borne proportionably by all who are interested. To obtain the necessary proofs, in order to ascertain the proportions for which each contributor is liable, a bill in equity may frequently be the safest mode of proceeding; but, if a plaintiff can make out his case, without having recourse to the assistance of a court of equity, he may, no doubt, recover contribution by an action at law: *Birkley v. Presgrave*, 1 East, 228. As to the distinction between general average, and (what is called, not very accurately) simple, or particular average, see the case respecting *The Copenhagen*, 1 Rob. Adm. Rep. 293; and *Covington v. Roberts*, 2 New Rep. 378.

[* 192]

BROWN v. HIGGS.

THE Decree in this cause (1) was affirmed in the House of Lords, in 1813.

(1) *Ante*, vol. iv. 708; v. 495; viii. 561.

NICHOLLS v. BUTCHER.

[ROLLS.—1810, DEC. 4.]

UNDER a devise of "all my real property" copyhold estate passed to the devisee and his heirs.

Effect of the word "estate" in a Will; as importing the absolute property (a), [p. 195.]

WILLIAM BUTCHER, being seised to the use of him and his heirs of copyhold lands, held of the manor of Great Stanmore in the county of Middlesex, and having surrendered to the use of his Will, by his Will, dated the 16th of July, 1802, made the following disposition:

"I do will and bequeath all my real and personal property to my wife Molly Butcher."

The testator died on the 5th of March 1805, leaving the Defendant his heir-at-law and according to the custom of the manor. The testator's wife, having been admitted for her life, died on the 31st of March, 1808, intestate; leaving the Plaintiff her heir-at-law and by the custom; who filed the Bill to have the testimony of the witnesses to the Will perpetuated; insisting, that the wife took the copyhold premises to her and her * heirs. The [* 194] Defendant by his answer, contending, that the wife took only an estate for life, claimed as the heir of the testator according to the custom.

Mr. Treslove, for the Plaintiff.—The effect of the word "estate" to pass the fee has long been settled; and other words, of equal force to show the intention, must have equal effect. If the word "property" had occurred, instead of "estate," in *The Countess of Bridgewater's Case* (1), there seems little reason to doubt, that the construction would have been the same; as Lord Holt said, that the word "estate" implies a fee simple; importing "the most absolute property a man can have;" and the word "property" must be equivalent. That expression of Lord Holt is referred to in *Ridout v. Pain* (2) by Lord Hardwicke; who in *Bailis v. Gale* (3) declared, that under a devise of "all that estate I bought of Mead," both the thing itself, and the estate, "*property*," and interest the testator had, passed. In *Hogan v. Jackson* (4) there were introductory words in the Will "as to my worldly substance;" and the residuary clause gave all the "remainder and residue of all the effects both real and personal which I shall die possessed of." Lord Mansfield

(a) The word "estate" is said to include every kind of property, unless specially restrained. 2 Hilliard, Abr. 528; *Turbett v. Turbett*, 3 Yeates, 187; *Morrison v. Semple*, 6 Binn. 97; *Jackson v. Morril*, 6 Johns. 191; *Busby v. Busby*, 1 Dallas, 226.

(1) 6 Mod. 186.

(2) 3 Atk. 486; see 492; 1 Ves. 10.

(3) 2 Ves. 48.

(4) Cowp. 299.

said, if the word "effects" is equivalent to worldly substance, or if it is synonymous to *property*, there is an end of the question; as then all the cases prove, that the sweeping clause passes a fee. The most direct authority is Doe on the demise of *Helling v. Yeud* (1.) The words of the Will were, "all the remainder of my property," but combined with other words, confining their operation to

[* 195] *personal estate: Rooke, Justice, said, "I agree that the general words would be sufficient to carry a *fee simple* in the lands, if they stood alone."

Sir *Samuel Romilly* and Mr. *Courtenay* for the Defendant.—The word "estate" passes the fee; being considered as describing not merely the lands, but the interest in them. The word "property" however has not received that construction. No case is to be found, in which that word has been held to denote the *quantum* of interest, which the testator had to devise. All the cases, cited for the Plaintiff, are decisions upon words, by which the residue has been disposed of; always furnishing a strong inference, that the testator did not mean to die intestate.

MASTER OF THE ROLLS [Sir WILLIAM GRANT].—In the absence of direct authorities upon the subject I think the testator must be considered to have intended to pass his whole interest; as I do not see, how a man can be said to give all his property, unless all his interest in it passes. It seems in many of the cases, that the Judges have explained the meaning of the word "estate," by saying, that it imports the absolute *property* (2.)

THAT the word "estate," when used by a testator, may carry the entire fee in all his real estate: see, *ante*, note 4 to *Rashleigh v. Master*, 1 V. 201, and, notwithstanding what was said, *arguendo*, in the principal case, the same construction has been put upon the word "property:" *Patten v. Randall*, 1 Jac. & Walk. 195.

[* 196]

GUY v. PEARKES.

[1811, JULY 17.]

ADVANCES to a married woman, deserted by her husband, on the credit of a fund in Court, her property, for her maintenance, exceeding the income of that, reimbursed out of the capital (a).

THE Master's Report in this cause, ascertaining the interest of the Defendant Mary Jones in a fund of stock, the personal estate of the testator Sarah Barrow, stated, that upon her marriage in 1804 there was no settlement or agreement for a settlement; that soon afterwards her husband went to sea, and totally deserted her; that in

(1) 2 New Rep. 218, 221.

(2) *Patten v. Randall*, 1 Jac. & Walk. 189.

(a) See *ante*, note (b) *Ball v. Montgomery*, 2 V. 191.

1809 he returned, but did not cohabit with, or even see her, or afford her any support; that in March 1810 he went to the East Indies; and has not been since heard of; and she does not know, whether he is living or dead; that she is fifty years of age; has no issue, and has been totally destitute since 1804; that ——— England has made advances to her at the rate of 30*l.* per annum from 1804; which was her only support.

A motion was made that the Accountant General may be ordered to sell so much of the stock, as will raise the sum of 210*l.*, to be paid to England, and 50*l.* to Mrs. Jones; and that the dividends of the remaining fund, about 450*l.* stock, may be paid to her for her future support.

England stated by his affidavit, that he was induced to make the advances upon the faith of being repaid out of this fund.

Mr. Hart, in support of the Motion, admitting the difficulty from want of the husband's consent, said, he believed the Lord Chancellor had in one instance ordered repayment to a person who had supported the wife *under similar circumstances: but [* 197] without a precedent the Court would exercise a discretion upon the husband's abandonment; and the Master of the Rolls, to whom the application was first made, inclined to grant it: but, not being aware of any instance, permitted it to be made before the Lord Chancellor; thinking the precedent would be more properly made by his Lordship.

The affidavit of England states most particularly, that, knowing her situation, he made this moderate advancement upon the credit of this fund; and, as to the difficulty, that the allowance is more than a just proportion of the fund with reference to the future, she must be contented with a less income in future.

The Lord CHANCELLOR [ELDON].—I have a strong impression on my mind that this has been done; and independent of precedent, I think the Court may do it: as the husband, deserting his wife, leaves her credit for necessaries, and would be liable to an action: and, though execution could not be had against the stock, the effect might be obtained circuitously; as he could not relieve himself except by giving his consent to the application of this fund.

THOUGH no execution or attachment can issue against stock, *eo nomine*; at all events, when there is no positive *lien* thereon; yet courts of equity are in the habit of getting at stock circuitously, in many cases: see, *ante*, note 1 to *Dundas v. Dulens*, 1 V. 196. And, where a husband has deserted his wife, a court of equity, if it has funds under its control, to which the husband is entitled only in right of his wife, will provide for her support out of those funds: see note 1 to *Ball v. Montgomery*, 2 V. 191.

AURIOL v. SMITH.

[1811, JULY 19, 23; OCT. 30.]

COPIES of the books of the Bank of England are evidence: but upon a question, whether the signature to a transfer is the genuine hand-writing, the book must be produced (a).

Distinction between the books of the Bank of England and Records, [p. 203.]

False representation by bankers, that they have laid out money in the Funds, indictable as a conspiracy, [p. 203.]

Copy of parish Register evidence (b), [p. 204.]

A MOTION was made by the Plaintiff, that the Bank of England may be ordered to produce before the Examiner the original transfer books of the funds, referred to by their answer. The object of the Motion was to ascertain by the signature to various transfers of Stock in the 4-per cents., what stock in that fund the Defendant Smith had, standing in his name, at a particular period.

Sir Samuel Romilly and Mr. Bell, in support of the Motion.—The object of this Motion is not, as is represented, a public exposure of the books of the Bank, but merely permission to inspect the books under their control for the purpose of identifying the signature of Joshua Smith with this particular Defendant. A letter from the Solicitor of the Bank states., that only one person of the name of Joshua Smith, held Stock in the 4-per cents. from the year 1760 to 1766; and it is proposed in direct opposition to the Defendant's oath to prove, that he had Stock during that period, in 1763. It is true, other evidence may be admitted incidentally; and in the case of *Campion v. Lambert* (1), where it was held, that the Bank Ledger was not evidence, copies of the transfers were admitted.

Sir Arthur Pigcott, for the Bank.—The resistance to this application has certainly no view to embarrass the Plaintiffs.
[* 199] They are entitled to * copies of the transfers, with evidence of the hand-writing by the Clerk, who saw the party sign, and of the hand-writing of that Clerk, if dead. That is all they are entitled to; and that evidence is constantly received at

(a) As to proof of public documents not judicial, 1 Greenl. Ev. § 479–491.

The contents of the books of the Bank of England may be proved by copy; ib. § 484; *Mortimer v. McCullon*, 6 M. & W. 58.

The rule may be considered as settled, that every document of a public nature, which there would be inconvenience in removing, and which the party has a right to inspect, may be proved by a duly authenticated copy. 1 Greenl. § 484; *Gresley*, Evid. 115.

(b) 1 Greenl. Ev. § 484; *Phil. & Am. on Ev.* 594–597; 2 *Phil. Evid.* 183–186; *Lewis v. Marshall*, 5 Peters, 472, 475.

So, also, copies of the registers of births and marriages, made pursuant to the statutes of any of the United States. *Milford v. Worcester*, 7 Mass. 48; *Commonwealth v. Littlejohn*, 15 Mass. 163; *Sumner v. Sebec*, 3 Greenl. 223; *Wedgwood's Case*, 8 Greenl. 75; *Jacock v. Gilliam*, 3 Murphy, 47; *Martin v. Gunby*, 2 H. & J. 248; *Jackson v. Brueham*, 15 Johns. 226; *Jackson v. King*, 5 Cowen, 237; *Richmond v. Patterson*, 3 Ohio, 368.

(1) At the Rolls.

Nisi Prius. This is a Motion of the first impression ; and the consequences will be most serious. These books contain near 25,000 transfers, in printed forms ; and the copies now offered have always been held sufficient upon this public ground, that these books are public documents, kept by public officers, in forms not prescribed by the Acts of Parliament, but long settled ; and must remain, where they are deposited for public purposes, constituted by Law. Upon these grounds copies have always been held sufficient, except in criminal cases, as forgery, and perhaps the case, put by your Lordship, of perjury or conspiracy. The hand-writing of this Defendant, who is described as residing once in Lambeth, and afterwards in Great George Street, is capable of being proved ; and why should he not go to the Bank (1), see the transfers, and whether the signature is his ? Lord Kenyon reprobated the objection to the copies, as evidence ; holding, that the Bank would be guilty of a gross breach of their public duty by permitting the books to be removed : *Marsh v. Colnett* (2). In *The King v. Lord George Gordon* (3) sworn copies of entries in the Journals of the House of Commons were read as evidence ; and Lord Glenbervie (4) presumes, that sworn copies of the Journals of Parliament are clearly evidence ; stating, that the Court denied the rule to be according to the general notion, that copies of nothing but records are admissible ; and mentioning several instances, where copies of matters, not of record, are admissible ; as copies of Court Rolls, Parish Registers, * &c., and that the reason of inconvenience applies with [* 200] greater force to such public books as the transfer books of the East India Company ; for the utmost confusion would arise, if they could be transported to any the most distant part of the kingdom, wherever their contents should be thought material in the trial of a cause ; concluding, that the correct principle is laid down by Lord Holt in *Lynche v. Clarke* (5), that wherever the original is of a public nature, and would be evidence, if produced, an immediate sworn copy thereof will be evidence.

The books of the Bank of England are clearly within the protection of the Law under the Acts of Parliament, by which they are directed to be opened, in printed forms, and to be kept at the Bank by a public officer, the Accountant General, for this specific purpose, the transfers by the public creditor ; who are paid by money, issued every year from the Exchequer in consequence of the engagement of Government with the public. Every person, claiming an interest in this way, must have the same right, whenever a transfer is made : Consequently equal rights may exist to have the recent books, for instance, of the 3 per cents. at all the assizes, at York

(1) *Brace v. Ormond*, 1 Mer. 409.

(2) 2 Esp. N. P. Ca. 665 ; *Breton v. Cope*, Peake's N. P. Ca. 30 ; Peake's Ev. 93, 246 ; (1st edit. 91, 231.

(3) Doug. 590 ; (561, 1st ed.)

(4) Doug. 583 ; (572, 1st ed.)

(5) 3 Salk. 154.

and Exeter at the same time, with enormous inconvenience, and great probability of irreparable mischief from accidents. In the period of more than 120 years, during which the Bank has existed, there is no instance of such an application ; and it is at this time of the utmost importance, that the course, which has uniformly prevailed, should not be disturbed : these books containing the evidence of every man's property to an immense amount. In this instance no failure of Justice, no inconvenience, can follow

[* 201] from admitting * copies as evidence. The Defendant by his answer, which is mere evasion, does not raise a question of forgery by asserting, upon inspection, that these are not his transfers. The result of four Answers, put in without taking the means of informing himself, is no more than general assertion, admitting some transfers, and that he has no recollection of the others. Can it be believed, that he has no recollection of transferring such a sum, 21,000*l.* re-transferred to him, by 17 or 18 transfers ? The different warrants are gone into the Exchequer long ago : but there is a check-book at the Bank to justify the clerk parting with the warrants ; from which book copies may be had, if necessary. The Court will not make a precedent, involving such extensive and serious consequences, without an absolute necessity ; which the circumstances of this case do not present.

The Lord CHANCELLOR [ELDON].—In the case of the East India Company, the Court of King's Bench did not order the copy to be read in evidence in the first instance ; but granted a rule to show cause ; in effect determining, that they should be evidence. I apprehend, that according to the practice of this Court, particularly the more ancient, requiring a party to go to the Six Clerks' Office, and examine papers referred to, this Plaintiff, being now aware, that the Defendant can see these transfers himself, may amend the bill ; calling upon him to look at them, and see, whether they are, or are not, his hand-writing.

Sir *Samuel Romilly*, in reply.—That practice is confined to papers referred to, and left with the Clerk in Court.

[* 202] * There is no other mode of proving the hand-writing to these transfers than the production of the book. The circumstances of this case require the strictest proof against this Defendant : who, as the Plaintiffs contend, made a false statement before the arbitrator as to the property in the funds ; the Plaintiffs asserting, that there was not the sum of 16,000*l.* standing, when he said there was ; and that there were transfers to and from him, of which he has said nothing. The Plaintiffs must prove the affirmative in both instances ; when he had, and when he had not, stock. They have imposed upon them the necessity of establishing the whole of that case ; and all, that is now offered, being short of a production before the examiner, is not sufficient. This is not like the case of *Bretton v. Pope*, in which there could be no doubt, that the copy was evidence of the mere fact of the transfer. In a very late instance, an action against the surety of one of the clerks of the Bank,

who had forged dividend warrants, they thought it necessary to produce their books. This cannot depend upon the inconvenience; which applies equally to all insurance offices. A clerk might possibly be wanted at the same time in two distant parts of the kingdom.

The Lord CHANCELLOR [ELDON].—This is a case of a very special nature. The identity of an individual is to be established by proving his hand-writing: it is not absolutely necessary for his defence, that it should be open to him to desire to see what is said to be his hand-writing; to prove, perhaps, by a hundred witnesses, that it is not; and how can he do that without the original? Suppose, that evidence offered in a criminal proceeding, was a clerk of the Bank; stating, that he had examined it with the original; and it was the hand-writing of the Defendant: the first objection would * be, that this is not the best evidence. The books [* 203] of the Bank are not like records (1); which cannot be parted with; and there is a plain demand of justice for the production of these books: as the Defendant, admitting, that the clerk believes the writing to be his, may deny it positively; stating, that, if the original transfer is produced, he will prove by numerous witnesses, that it is not his. These objections would prevail in a criminal proceeding, for forgery, perjury, or a case, which I wish to see tried, an indictment against private bankers for a conspiracy by a false representation, that they had laid out money in the funds (2): and why in a civil suit should not the original be produced; unless the Bank books have the nature of records? If they are not so by Act of Parliament, I do not know a principle, upon which in that respect they can be distinguished from the books of a tradesman.

The inconvenience may certainly be considerable, where public documents are wanted in different places at the same time: but, if it is necessary to ascertain the fact by producing the original, it must be produced, whatever the inconvenience may be; and that may arise equally in a civil as a criminal case. Upon an indictment for bigamy the actual marriage must be proved; and the register must be produced: but I can put the case of a civil suit, where the same necessity would occur. Suppose, for instance, upon a writ of dower brought, the Defendant proposed to prove, that the person alleged to be the Plaintiff's husband, had another wife living: would not the Plaintiff be entitled to insist on the production of the original register; and to show, that the signature was not that of the person, whom she alleges to be her husband? The proper point therefore, depending on particular circumstances, comes to this: where a case occurs, in which the hand-writing, being controverted, is to be proved or disproved by evidence before a jury, how it is * possible to deliver the party, who [* 204]

(1) *Anle*, vol. i. 152, and the note:

(2) *Anle*, *Ex parte Stephens*, vol. xi. 24.

has the custody of that writing, from the necessity of producing it.

Consider the case of a clerk coming from the Bank, in the most familiar instance, stock transferred, and a declaration of trust. If by Act of Parliament the books of the Bank are to be kept there, they would stand upon the same footing as by the canon the parish registers are; which are to be kept in the parish chest: those *prima facie* are not to be produced: and other evidence, that of the clerk, who saw the party write it, would be sufficient: but, though the evidence of the clerk, who saw him do the act, combined with the direction of the act of Parliament against removing the books, is good *prima facie*, the party would have a right to prove in two ways, that the clerk was mistaken: first, upon the production of the writing, sworn to be his, he may prove the negative, that it is not: which alone perhaps would not prevail against the positive evidence of the clerk, who saw him write it: but he might add proof, that he was not there; leading to a conclusion, that must reduce the contradiction to no evidence whatsoever. If he rested upon the *alibi*, saying nothing upon the hand-writing, might not the other party, having an equal right to resort to the same species of evidence, say, those persons, who prove the *alibi*, must be mistaken; and prove by several witnesses, that the hand-writing is genuine? So, if the clerk, who attested the signature, should be dead, his death and the hand-writing of the party might be proved. If, according to the old practice, the Court would compel a man to go to the Six Clerk's Office, to examine papers referred to, and see, whether they are his hand-writing, I should upon the same principle compel him in this case to go to the Bank, if the Legislature has directed these books to be kept in the Bank.

[* 205] * A case of exception may exist, arising out of a particular Act of Parliament: but I can put no other instance, in which, if a man is charged in a civil suit by evidence of his hand-writing, that, which is alleged to be his hand-writing, must not be produced. I will consult Lord Ellenborough; whose practice has been referred to, as what is legal evidence must be evidence here; and, if I can find what may be considered a course of practice upon what has been admitted as legal evidence, that will satisfy me.

Oct. 30th. By the Lord CHANCELLOR's direction a Motion was made, that examined copies of the Bank books may be read at the hearing of the cause.

Sir Arthur Piggott, for the Bank, insisted upon the great public inconvenience of producing the books; and declared, that the Defendant ought, and had full liberty, to inspect the transfers.

Mr. Richards, for the Defendant Smith, contended, that the inconvenience to the Bank, an objection equally applicable to Child's, or any other house, could not be a reason for taking from the Defendant the benefit of the general rule, requiring the best evidence.

The Lord CHANCELLOR [ELDON].—I directed this Motion to be

made for the purpose of settling the practice. There is infinite inconvenience in the proposition, that such a sort of document should be considered legal evidence: yet I find, that the Courts of Law have directed it to be received in several instances, with reference to books of the great public companies; and I am much more struck by the great extent, in which it has been permitted even in criminal proceedings. At the Old Bailey a man has been permitted, without bringing *the books, to say he has looked through [*206] them, and they do or do not contain particular entries. Upon the ground, that these are the books of a public company, kept under the authority and by the direction of an Act of Parliament, the Judges have upon motion for a rule to show cause, why copies, of the East India books particularly, should not be admitted, directed them to be received. I am aware of the extreme importance of this in more views than one. If the opinion of the House of Lords should hereafter be, that this is not evidence, I shall by granting this Motion put the Plaintiff under circumstances, in which he will be no farther forward: but the consequence of not granting it will be, that there is no case, in which the books of the Bank may not be produced at every assizes in the kingdom.

The Motion ought to particularize the transfers, copies of which they propose to read; and the Bank, who formerly offered only the inspection of their clerk, do not now resist a personal inspection of the books by any person, who has an interest. This surprise may occur: that, when these copies are read at the hearing, the Defendant may not know how to make out, that a transfer under the same name is not his transfer. It may be either a forgery, or the name of another person. I feel a difficulty therefore in granting the Motion, unless in some way the Defendant has an opportunity of going to the Bank, and putting that fact in issue. It appears to me, that, if the question ever comes to be that, the book itself must be produced.

The Lord CHANCELLOR [ELDON] afterwards declared, that, whatever doubt formerly prevailed upon this subject, it is now well established by the House of Lords, that copies of the books of the Bank of England are evidence; with this exception, that, where the question is, whether a *transfer, purporting to be the [*207] hand-writing of an individual is genuine, the books themselves must be produced.

1. COPIES from the books of the Bank were held, by Lord Kenyon, in *Breton v. Cope*, Peake's N. P. C. 31, to be the proper evidence to prove a transfer of stock: and, in *Marsh v. Colnett*, 2 Espin. 665, the same learned judge went farther, and said, though the Bank books were in court, yet, as they were public books, which public convenience required should not be removed from place to place, he, for the sake of example, would not have the originals produced; but should, in preference, admit a copy from them in evidence, to prove a transfer of stock. In *Davis v. The Bank of England*, 2 Bingh. 404, it was likewise held, that copies of the Bank books are *prima facie* evidence, to show that a transfer has been made; but the exception laid down in the principal case was also distinctly recognised

namely, that where the question is, whether the hand-writing of an individual is genuine, there the books themselves must be produced.

2. As to the admissibility of copies of registers of births or marriages, see, *ante*, notes 1, 3, to *Lloyd v. Passingham*, 16 V. 59.

KINGSLEY v. YOUNG.

[1811, JULY 31; AUGUST 1.]

SPECIFIC performance of a contract for sale of an allotment under an Inclosing Act before the Award: the Act expressly enabling a sale and declaring the conveyance valid, before the Award; and the purchaser having notice of the circumstances.

Award under Inclosing Act rather evidence of, than constituting, title, [p. 208.]

THE Defendant appealed from the Decree for a specific performance, pronounced at the Rolls (1).

Mr. *Hart* and Mr. *Wetherell*, for the Defendant, contended, that the mere allotment could not give an immediate legal estate. Until the Act has proceeded to the extent of producing an award, no party has any estate whatever. Objections may be taken, and an injunction obtained, against the award; and the clause of the Act, authorising the sale of an allotment before execution of the award, has no meaning, and must be inoperative.

Sir *Samuel Romilly*, Mr. *Cooper*, and Mr. *Sugden*, for the Plaintiff.—The allotment has the effect of seisin; and the award is merely evidence of title. If the freehold does not pass by the allotment, it is difficult to say, where it is. The words of this Act declaring, that the conveyance shall be good, valid and effectual in law, are stronger than those of the Statute of Richard III. (2) enabling *Cestui que Use* to convey. Taking the party to have a mere equitable estate, the words of the Act are sufficient to [* 208] *enable him to give a legal title. A contract for the sale of the vendor's interest, whatever it may be, in an allotment, would be enforced in equity; and your Lordship on one occasion (3) mentioned an instance of the sale of an allotment by a man, not knowing what his right was. This clause represented as inoperative, and thrown in without meaning, is a common clause in every act of inclosure, and has a very sensible object, to enable the party to convey the legal estate before the award made. Whenever it is intended, that the Commissioners shall have the power of varying the allotments, a special clause for that purpose is inserted.

The Lord CHANCELLOR [ELDON].—Considering the policy of these Acts and the General Inclosure Act (4), and, when the Legis-

(1) Reported *ante*, vol. xvii. 468.

(2) Stat. 1 Rich. III. c. 1.

(3) *Ante*, vol. vi. 24.

(4) Stat. 41 Geo. III. c. 109.

lature has pointed out by enactments constantly in all these Acts, that are well drawn, that the allotment shall be capable of disposition before the award, which finally is rather evidence of, than constituting, title, I cannot in a Court of Equity say, that a contract, entered into for sale and purchase, shall not be carried into execution. Under all the circumstances therefore, attending to the General Inclosing Act and this particular Act of Inclosure, I think the Decree of the Master of the Rolls right.

SEE note 4 to *Cooth v. Jackson*, 6 V. 12.

COOKE v. MARSH.

[* 209]

[1811, AUGUST 2.]

AFTER an Order in bankruptcy for liberty to bring an Action with special directions for a production of papers and not to set up the bankruptcy, a Bill of Discovery cannot be filed.

A PETITION to supersede a Commission of Bankruptcy, having been ordered to stand over, with liberty to bring an action, to ascertain the existence of a partnership, a production of all papers, &c. and the bankruptcy not to be set up, a bill of discovery was filed; to which a demurrer was put in.

Mr. *Richards*, Sir *Samuel Romilly*, and Mr. *Heald*, in support of the Demurrer.—The circumstances, appearing upon the petition in the bankruptcy, made it absolutely necessary to take some course to ascertain the existence of the partnership, and prevent the prosecution of several Commissions of Bankruptcy. With that view this course was adopted: permission to bring an action, with a production of all papers, prohibiting a certain defence. What is the distinction in substance between that and an issue; which would have been directed, if any different consequences had been foreseen? Is it possible to maintain, that your Lordship can grant an injunction, restraining the prosecution of your own order in bankruptcy? If any evasion of the order for the production of papers, &c. had been attempted, the proper remedy is a petition in the bankruptcy.

Mr. *Leach*, Mr. *Hall*, and Mr. *Bell*, for the Plaintiff.—There is no authority upon this subject; which is certainly new: but upon principle there is as much right to * file a bill of [* 210] discovery in aid of this action as any other. The distinction between an issue and an action is clear. An issue is a fictitious proceeding, created and prosecuted under the direction of the Court: but an action, unless the permission to bring it is restrained by some special direction, is open to all means, that may be adopted in the common course at law. The Court, directing an issue, as-

serts, that there is a question to be tried: but that is not the effect of permitting an action.

The Lord CHANCELLOR [ELDON].—I cannot bring myself to admit such a precedent as this; but would not give way to the objection, if the effect would be to exclude any examination essential to Justice. That however, it seems to me, cannot be the effect; and the common proceeding in bankruptcy is quite sufficient to counteract it. The single question is, whether, adopting the form of an action instead of an issue, I could mean to give an opening to inconveniences, which in an issue could not possibly occur. Take the ordinary case of a petition presented by a bankrupt, and an order, permitting him to bring an action, and the petition to stand over: was there ever an instance of filing a bill of discovery without leave; and could I in Chancery grant an injunction against a proceeding at law, ordered by me in bankruptcy? I did not leave this case liable to the incidents of a common action; ordering a production of papers both in the Master's office and at the trial; and upon a petition, stating, that the order for that production had been defeated by a trick, I should order it to be tried again; though it was put in the form of an action. If this bill can be sustained, it would be impossible to proceed upon a petition in bankruptcy; which might be suspended during all the proceedings in a cause here and upon Appeal to the House of Lords. There might be a case, in [* 211] which in bankruptcy I might direct a bill of discovery to be filed, or these very interrogatories to be answered: but, considering the consequences, I cannot conceive, how the jurisdictions can go on longer: and therefore must stop the proceedings upon this bill (1).

SEE note 2 to *Spragg v. Binkes*, 5 V. 583.

(1) Buck, 299.

THE ATTORNEY GENERAL v. CLEAVER.

[1811, August 1, 2, 12.]

JURISDICTION by Injunction, on Information by the Attorney General at the relation of individuals, against a nuisance by an offensive and unwholesome process in trade, not exercised without a trial at law; regulating according to justice the time of trial of an Indictment depending, and removed by *Certiorari* into the King's Bench, from the Assizes, as against the Relators; whether as against the Defendants, *quære*.

Instances of trades offensive, and in some degree unwholesome, not legally a nuisance, [p. 217.]

A sugar-house, brew-house, &c. Injunctions in such cases cautiously granted, and not *ex parte* (b), [p. 217.]

Jurisdiction upon public nuisance in a highway or a harbor; if upon the King's soil, the Crown may abate: if not, the fact must be tried by a Jury (c), [p. 218.] Manufacture of bricks not a nuisance, [p. 219.]

No general jurisdiction in Equity to enjoin or regulate proceedings upon Indictment: but circumstances may give it; as, where prosecuted by Relators in an Information or Plaintiffs, they are subject to control by order personally affecting them, but not the Defendants, [p. 220.]

(a) Courts of Equity will not interfere to stay proceedings in any criminal matters, or in any cases not strictly of a civil nature. As, for instance, they will not grant an injunction to stay proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition. But this restriction applies only to cases, where the parties, seeking redress by such proceedings, are not the plaintiffs in Equity; for, if they are, the Court possesses power to restrain them personally from proceeding, at the same time upon the same matter of right, for redress in the form of a civil suit, and of a criminal prosecution. 2 Story, Eq. Jur. § 893: Jeremy, Eq. Jur. 308, 309.

As to the jurisdiction of Equity in cases of nuisance, see 2 Story, Eq. Jur. § 920-927.

(b) There must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented but by injunction. For cases coming within the above principle of interference, see 2 Story, Eq. Jur. § 925-929; *Corporation of N. York v. Mapes*, 6 Johns. Ch. 46; *Reid v. Gifford*, 1 Hopk. 416; *S. C.* 6 Johns. 19; *Mohawk and Hudson Rail Road Co. v. Archer*, 6 Paige, 83; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Barrow v. Richards*, 8 Paige, 351; *Hammond v. Fuller*, 1 Paige, 197; *Bonaparte v. Camden and Amboy Rail Road Co.* 1 Baldwin, 231; *Belknap v. Trimble*, 3 Paige, 577, 601; *Ogden v. Gibbons*, 4 Johns. Ch. 159; *Croton Turnpike Co. v. Ryder*, 1 Johns. Ch. 615; *Corning v. Laverre*, 6 Johns. Ch. 439; *Van Bergen v. Van Bergen*, 2 Johns. Ch. 272; *S. C.* 3 Johns. Ch. 282.

(c) As to the jurisdiction of Equity in cases of public nuisance, see 2 Story, Eq. Jur. § 920-924.

Purpresture, according to Lord Coke, signifies a close, or enclosure, that is, when one encroaches, or makes that several to himself, which ought to be common to many. 2 Inst. 38, 272. The term was, in the old law writers, applied to cases of encroachment, not only upon the king, but upon subjects. But, in its common acceptation, it is now understood to mean an encroachment upon the king, either upon part of his demesne lands, or upon rights and easements held by the crown of the public, such as upon highways, public rivers, forts, streets, squares, bridges, quays, and other public accommodations. 2 Story, Eq. Jur. § 921; *Watertown v. Cowen*, 4 Paige, 510; *Commonwealth v. Wright*, 3 Amer. Jurist, 185; *New Orleans v. U. States*, 10 Peters, 662; *Attorney Gen. v. Forbes*, 2 Mylne & C. 123; *Ripon v. Hobart*, 3 Mylne & K. 169; *Mohawk Bridge Co. v. Utica and Schenectady Rail Road Co.* 6 Paige, 554; *Attorney Gen. v. Cohoes Co.* 6 Paige, 133.

If the thing sought to be prohibited is in itself a nuisance, the Court will inter-

THIS information, filed at the end of July 1811, at the relation of several inhabitants of Battersea and Chelsea, prayed, that the Defendants may be perpetually restrained from manufacturing soap or black ash, and from boiling, melting, calcining or burning, any of the materials used in manufacturing soap or black ash in their manufactory in the parish of Battersea; or that they may be restrained until trial of the indictment, in the pleadings mentioned; and that they may be compelled to proceed to trial at the next Assizes for the County of Surrey.

The Information stated, that the manufactory of the Defendants was erected between June 1808 and August 1809; that almost immediately after the building was begun, the Defendants received notice, that, if the purposes, for which it was about to be erected, should prove injurious to the neighborhood, measures would be taken to suppress the injury. After the building was completed in 1809, they began the * manufacture, at first to a small extent: but since June 1810 they greatly increased it, to the great injury and prejudice of the inhabitants of Battersea and Chelsea. The Defendants by a letter in answer to the complaint of some of the inhabitants of Chelsea represented, that if any thing unpleasant had arisen, of which they were not aware, it must have been produced by some accident, and was not the result of any permanent system in their manufactory: that they would immediately take proper precautions to prevent a recurrence of the like accident; and hope, the inhabitants of Chelsea will not have any reason to complain.

A Bill of Indictment was found by the Grand Jury at the last Lent Assizes; which the Defendants removed into the Court of King's Bench by *Certiorari* in Easter Term last.

A Motion was made for an injunction upon several very strong affidavits, describing the process as both offensive and unwholesome; and stating the effects of the smell from the the vapor, even across the river, and farther to a considerable distance.

Sir Samuel Romilly, Mr. Hollist, and Mr. Spranger, in support of the Injunction.—In the case of *Barnes v. Baker* (1) Lord Hard-

fere to stay irreparable mischief without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action; and, if need be, expedite the proceedings, the injunction being in the mean time continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something, which may, according to circumstances, prove so, then the Court will refuse to interfere, until the matter has been tried at law, generally by an action; though in particular cases an issue may be directed for the satisfaction of the Court, where an action could not be framed so as to meet the question. The distinction between the two kinds of erection or operation is obvious, and the soundness of that discretion seems undeniable, which would be very slow to interfere, where the thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. Per Brougham, Chanc. *Ripon v. Hobart*, 1 Cooper, Sel. Cas. 333; *S. C.* 3 Mylne & K. 169. See *Mohawk Co. v. Utica and Schenectady Rail Road Co.* 6 Paige, 559, 563; *Spencer v. London and Birmingham Railway Co.* 8 Sim. 193.

(1) Amb. 158; 3 Atk. 750.

wicke admits, that against a public nuisance this Court will enjoin ; and says, the application should be by the Attorney-General ; putting the case of an interruption of way behind the Royal Exchange before Lord King. In *The Mayor &c. of the City of London v. Bolt* (1) the injunction was granted against a public nuisance. The *affidavits as to the effect of this process, as [* 213] not merely disagreeable but unwholesome, are very strong and unanswered. The trial of the indictment, which was preferred, and found a true bill, has been evaded by removing it into the Court of King's Bench. The object of the Injunction is to restrain the working during the interval before the next Lent Assizes ; and the Court will at least compel them to put this in a course for speedy trial.

Mr. *Richards*, Mr. *Hart*, Mr. *Bell* and Mr. *Wray*, for the Defendants.—This is a singular application ; involving consequences, the extent of which cannot be calculated. The application is really to abate this, which is called a nuisance, but is in truth a large trading concern, comprising property to a vast amount ; and a Court of Equity is called upon, by enjoining the proprietors from proceeding, to destroy all this property, and the commerce, which they have carried on a considerable time. The Relators by their conduct, keeping the Defendants in ignorance of their intention to move until the evening of the 29th of July, precluded affidavits in opposition. Seeing these works proceeding, and this property engaged, they have lain by since the correspondence in June 1810 ; by that acquiescence encouraging these parties to proceed.

This jurisdiction was never applied to a subject of this sort. Many nuisances may be observed in this City, which the Law will not treat as such. This is not a public prosecution by the Attorney General, but at the relation of several inhabitants of the neighborhood ; and there is a wide distinction between the two sorts of Information. For the former the Attorney General is responsible, as the Officer of the Crown, acting in some sense judicially.

* Informations of the other description were formerly filed [* 214] almost of course, at the peril of costs : but of late the Attorney General has required a case previously to be laid before him ; a practice, which, commencing when your Lordship was Attorney General, was followed by Lord Redesdale ; and has restrained considerably the use of the Attorney General's name. The principle of this application is private nuisance to these individuals. The remedy for a public nuisance, as between the Crown and individuals, is by a criminal information by the Attorney General *ex officio*, according to Lord King's intimation upon the nuisance behind the Royal Exchange (2). Upon that principle the Court of Exchequer interfered in the late cases of Portsmouth Harbor and Bristol. Your Lordship cannot interfere in this case without irreparable mischief. The relators suffer no injury by removing the indictment ;

(1) *Anle*, vol. v. 129. See *Crowder v. Tinkler*, *post*, xix. 617.

(2) Cited in *Barnes v. Baker*, Amb. 158.

as the Defendants by a traverse could have put off the trial to the next Lent Assizes; and your Lordship cannot alter the course of Law. It is too much for this Court with its imperfect evidence to decide a question of nuisance, upon which it is extremely doubtful, whether an indictment could be maintained. An Inoculation House is not a nuisance in Law; though considered so by many persons; and the application in that instance was to prevent what was in contemplation, not to stop a trade in full exercise. In *The Mayor &c. of London v. Bolt* (1) also Lord Rosslyn interfered to prevent a nuisance, not to destroy a trade. If every manufactory disagreeable to the neighborhood, of which this City has many instances in the most populous situations, is to be treated as a nuisance, however material to the prosperity of the Country, the ef-

[* 215] fect will be most important. A * pest-house was held at the Oxford Sessions not to be a nuisance. The affidavit as to the noxious nature of the ingredients, used in this concern, is of no value. Ingredients, the most hostile to life, may be so compounded with others as to become, not only innocent, but medicinal.

The result of the authorities is no more than that a case may exist, that would authorise the Attorney General, as a public officer, to prevent the continuation or re-erection of that, which has been decided at Law to be a public nuisance.

Sir *Samuel Romilly*, in reply.—The general jurisdiction to restrain a public nuisance stands upon very strong authority; the opinion of two Judges of high character, that this was the common acknowledged jurisdiction; upon which the two reports agree in substance; and those opinions were followed by Lord Rosslyn's decision, granting the Injunction in *The Mayor &c. of London v. Bolt*. The principle, upon which the Court interferes, is the irreparable mischief; and if upon that principle the Court will restrain cutting trees, opening mines, &c. why should it not interpose in this case, unless health is of less value than property? The ground of the application is, not that this act is a crime, but that it occasions irreparable injury to several persons. The Defendants must establish, that as a crime being the object of a public prosecution, it is on that account entitled to protection here. The act of running away with a Ward of the Court for the purpose of an unsuitable marriage is an offence; yet this Court will hold jurisdiction upon it.

The delay in preferring the indictment, with its consequences, [* 216] must be imputed entirely to the Defendant's conduct, proceeding, after a formal notice, given immediately, that the trade, if it should prove a nuisance, would be prosecuted. It was at first offensive in a much less degree than since; and the complaint was answered by attributing the disagreeable effect to accident, and promising greater caution against similar consequences. The acquiescence, or rather forbearance, of the inhabitants thus solicited, did not induce the proprietors to embark more

(1). *Ante*, vol. v. 129.

property than was before engaged in the concern ; and differs in all respects from allowing a man to go on with an expensive concern, and suppressing the intention of afterwards representing it as illegal.*

Upon these affidavits this is not, as it is represented, a common soap manufactory, but of a very peculiar nature, extremely injurious to the health, as well as destructive of the comfort of the neighborhood : the noxious effect arising, not from the manufacture of soap, but from the process of calcination of what is called the soap waste.

The Lord CHANCELLOR [ELDON].—When this subject was first brought to my attention, which was by a Motion upon the Bill filed and affidavits, I was struck with the nature of it, principally upon this ground ; that, being aware of the *dicta* and cases, that have been mentioned, I did not recollect in my experience an instance of an Injunction actually granted, except the case before Lord Loughborough ; and if that Injunction was granted upon precedents, furnished by his Lordship's experience, I am not acquainted with more than is to be collected from the Reports of Atkyns and Ambler. I was also considerably struck with the importance of the case itself ; as it must bear upon the jurisdiction, affecting * interests of great magnitude and value ; the enjoyment [* 217] of which has been permitted without disturbance for a long series of years, and under circumstances provoking frequent application here, if likely to be successful.

What is nuisance, considered with reference to carrying on a trade, is a question of fact, which it is not very easy to determine. I have frequently known verdicts, deciding manufactories to be no nuisance ; by which, it cannot be denied, the whole comfort (1) of life is destroyed, and health must in some degree be affected. I recollect the instance of a sugar-house ; and a brew-house is within my own knowledge, perhaps not legally, but in common parlance, a great nuisance (2). The Court has, I think, already gone full as far, as it ought, in granting these injunctions in the absence of parties ; and some caution is necessary, before the Court should interpose to suspend, which may destroy, concerns of this nature, that cannot be established without immense expediture. Pressed by these considerations I thought it right not to take a step without notice given of the motion (3).

The instances of the interposition of this Court upon the subject of nuisance being very confined and rare, more is, I believe, to be collected from what has been done in the Court of Exchequer upon discussion of the right of the Attorney General by some species of information to seek on the equitable side of the Court relief as to nuisance ; and, if I may use those terms, * preventive relief. The case, cited by Lord Hardwicke, as

(1) As to obscuring ancient lights, see *The Attorney General v. Nichol*, ante, vol. xvi. 338 ; 3 Mer. 687.

(2) 1 Sim. & Stu. 68.

(3) *Crowder v. Tinkler*, post, vol. xix. 617.

having occurred before Lord King, was an information here by the Attorney General against a public nuisance by stopping a highway. Analogous to that there have been many cases in the Court of Exchequer of nuisance to harbors; which are a species of highway; and, if the soil belongs to the Crown, there is one species of remedy for that: the Crown may abate the obstruction; as it is upon the King's soil. Where it is not upon the King's soil, but merely a public nuisance to all the King's subjects, though the suit may be in the same form, the law is laid down in treatises, particularly by Lord Hale, *De Portibus Maris* (1), that upon the ground of public nuisance, and not as an obstruction upon the King's soil, it is a question of fact, which must be tried by a Jury; and, though the suit may be entertained, the Court would be bound to try the fact by the intervention of a Jury.

Admitting the jurisdiction, the question comes at last very much to this; whether, if the Court may grant an injunction, but ought not without a trial by Jury, I am authorized to interpose by granting an injunction in the interval; considering the Defendants as standing precisely in the same situation as if such a trial had taken place. Another view of this case is, whether I can by arranging the time of the trial of this indictment place the parties in the same situation as if it had not been removed by the Defendants, but the record had been by the other parties carried to the next assizes. Attending to the period and all the circumstances, if this is the right species of information, and had been filed soon after Easter Term, I am by no means convinced, that, as in ordinary cases an indictment [* 219] * may stand over from assizes to assizes, this Court would not, to enable itself to receive that assistance, so arrange the trial, that the equitable relief should not be too long delayed; as this indictment, though for what may be called a criminal act, has for many purposes a civil aspect. I am also by no means satisfied, if the information to be obtained through a Jury is necessary, as I think it would be, before an injunction should issue, that I am not authorised to take a much more prompt mode of ascertaining, whether this is a public nuisance, than even an indictment tried as expeditiously as it can be: but I should press the circumstances of this case too far by considering these Defendants in the same situation as if a verdict had been obtained against them.

The following cases were mentioned: *Coulson v. White* (2), *Ryder v. Bentham* (3), and *The Attorney General v. Doughty* (4).

The Lord CHANCELLOR [ELDON].—*Ryder v. Bentham* is a case of private nuisance. I can find no other cases than those which have been mentioned, except the *The Duke of Grafton v. Hilliard* (5);

(1) Chap. vii. Hargrave's Law Tracts, vol. i. 85.

(2) 3 Atk. 21.

(3) 1 Ves. 543.

(4) 2 Ves. 453.

(5) In Chancery, June, 1736.

in which the Attorney General was not the Plaintiff, but the Duke of Grafton filed the Bill to restrain the Defendant from burning brick-earth in the fields close to Hanover Square. The note I have gives me no information upon the doctrine as to public nuisance; amounting to no more than this: that the Court refused the injunction; observing, that the manufacture of bricks, though near * the habitations of men, if carried on for the purpose of making habitations for them, is not a public nuisance. [* 220]

Upon the circumstances of this case it is impossible to hold the Defendants as being in the same situation as if a verdict had been given against them. The point of doubt with me is, whether the Court has a jurisdiction to promote, what would be extremely just, a trial as speedy as justice requires. It is well established by authority, that this Court has originally no jurisdiction whatsoever either to enjoin or regulate the proceedings upon an indictment: but circumstances may give that jurisdiction: where, for instance, the relators are the persons prosecuting the indictment, I should have a control by Order personally affecting them: but I am not satisfied, that I have the same control over these Defendants, who have not come in. There is one case of a Bill, and a cross Bill, and also an indictment between the Plaintiffs and Defendants. Lord Hardwicke held, that he would deal with the subject with reference to what was civilly in question between them, though also the subject of a criminal prosecution; but I do not find, that he thought himself justified in that with regard to persons, who had not themselves resorted to him. Where the injunction has been refused, the Court has said at once, that the subject of complaint was not a nuisance: but there is no instance of holding it a nuisance, and therefore enjoining it, without a trial. Upon the affidavits this appears to me a much stronger case of nuisance than *The King v. Ward* (1).

Having got no farther at present than that these Defendants cannot be considered as having permitted a verdict to pass against them, this must be tried at law; and upon the only remaining * consideration, whether I have jurisdiction to spur them [* 221] on to trial, I think, as the relators might have applied sooner than the 25th of July, it is too much to call upon the Defendants, to try such a cause, in which it will be necessary to examine so many witnesses, next week in Surrey.

Aug. 12th. The parties having agreed, that the trial should be had in Middlesex, the Motion was ordered to stand over to the Seal before Michaelmas Term. The Lord Chancellor said, he had mentioned the case to one of the Judges of the Court of King's Bench, who would bring on the trial sooner than in the regular course;

(1) 1 Burr, 333.

and in the mean time it might be ascertained, whether this is a nuisance.

A compromise afterwards took place.

1. THE Court of Chancery, undoubtedly, has jurisdiction in cases of nuisance; though it exercises that jurisdiction very sparingly, upon *ex parte* applications: see, *ante*, note 2 to *The Mayor of London v. Bell*, 5 V. 129.

2. In *Rex v. White*, 1 Burr. 337, Lord Mansfield held, that, in order to constitute a nuisance which the law could notice, it was not necessary to show that the injury complained of was of an unwholesome nature, and prejudicial to health; but that it was enough, if it rendered the enjoyment of life and property uncomfortable: the same rule was laid down in the recent case of *The King v. Neal*, at the sittings of the Court of King's Bench, after Mich. Term, 1826.

3. On principles of public policy, the unreasonable interruption of free access to the sea, for proper purposes, would be a public nuisance. But this free access may itself be perverted into a common nuisance: for instance, access to the sea-shore may be used by bathers, so as to violate all decorum, by an indecent exhibition of themselves close to places of public resort; which the law would not allow. The King, for the public welfare, may suffer such a right to be exercised in those parts of the shore which remain in his hands, clothed with the *jus publicum*, to any extent which the convenience of the public may require; but even the King could not license a common nuisance: (See Lord Hale's Treatise, *De Portibus Maris*, part 2, chap. 7, in Hargrave's Tracts 85). And, if the soil of the sea-shore is vested in an individual, he cannot be deprived of the right of saying under what regulations that soil shall be used; supposing those regulations not to be so inconsistent with public policy, as to be in themselves a public nuisance; and, farther, that the regulations are not in contravention of any rights established by custom, and which have been enjoyed from the remotest time of legal memory: *Blundell v. Catterall*, 5 Barn. & Ald. 306.

4. Doubtful matters of fact are usually sent by courts of equity to be determined by a jury; but, where that is not thought necessary, it is competent to the court to take the decision of such matters upon itself: see note 1 to *The Canons of St. Paul's v. Cricket*, 2 V. 563; and note 1 to *Adley v. The Whistable Company*, 17 V. 315.

5. In a case where the plaintiff's right is clear, the fact that he has commenced an action at law makes no difference as to his right to an injunction to restrain intermediate waste, of a nature which could not be compensated by damages recovered in action: but where the legal question appears open to considerable doubt, strong ground must be shown to authorize the preventive interference of equity: see the note to *The Attorney General v. Nichol*, 16 V. 338.

6. As to cases of nuisance in obstructing ancient lights, see note 3 to *Hillary v. Waller*, 12 V. 239.

7. In the case of *The Mayor of York v. Pilkington*, 2 Atk. 302, Lord Hardwicke held, that although the Court of Chancery has not, originally and strictly, any restraining power over criminal prosecutions, yet, over all parties who have submitted their rights to the court, it certainly has a jurisdiction, and may interpose to stop their proceedings in any manner not regulated by itself. And his lordship, adverting to the just cited decision in *Lord Montague v. Dudman*, 2 Ves. Sen. 398, again observed, that it is only reasonable, where a question of right is depending in the Court of Chancery, the plaintiff should not to be permitted at the same time to proceed, by action or indictment, to have that question determined which he had previously submitted to the determination of equity.

LE HEUP, *Ex parte* (1).

[1811, August 14, 15.]

JURISDICTION to expunge scandal from an affidavit in lunacy, or bankruptcy, on reference to the Master (a).

In the appointment of Committee of a Lunatic relations, unless some specific objection, preferred to strangers (b).

The wife appointed Committee of the person, not alone, but jointly with a relation (c), [p. 222.]

Motion of course to refer a Bill or Answer for Impertinence or Scandal, [p. 223.]

THE Master having approved of the wife of a lunatic and his uncle, Dr. Waddington, as Committees of his person, and of a person, who was not related to him, as Committee of his estate, rejecting a proposal of Dr. Waddington and Mr. Hasted, a friend of the family, a petition was presented by the mother of the lunatic, praying, that she and Dr. Waddington may be appointed Committees of * the person, and not the wife; and that Dr. Waddington [* 222] and Mr. Hasted may be appointed Committees of the estate, instead of the person approved by the Master.

Another petition prayed, that the Master's Report may be confirmed; and that an affidavit, containing scandalous matter, may be taken off the File, and the scandal expunged.

Mr. Hart, Mr. Martin, and Mr. Utterson, in support of that application.—The proposition cannot be maintained, that no allegation of a fact, which may be material, can be scandalous, depending upon the question, whether it is introduced, not by insinuation, but in such a form, that it may be met by contradiction, and punished as a libel. Scandal ought to be expunged in any stage. This charge from its nature cannot be material; an allegation upon mere understanding and belief, that the editor of a newspaper formerly derived his chief means of subsistence from an annuity, supposed to be procured by

(1) 1 Collinson on Lunacy, 214.

(a) Any unnecessary allegation bearing cruelly upon the moral character of an individual is scandalous. 1 Barb. Ch. Pr. 41. Nothing pertinent to a cause is scandalous. Story, Eq. Pl. § 269.

As to exceptions for impertinence, see, *ante*, notes (a) and (b) *Pellaw v. —*, 6 V. 456.

(b) If the lunatic have a son of the proper age, and no objection exist to him, it is almost a matter of course to appoint him committee of the estate. *Matter of Lord Bangor*, 2 Moll. 518. But even the eldest son and heir at law will not be appointed one of the committee of a lunatic's estate, without giving security; unless the Master reports that no person can be found to act as such who will give security. *Matter of Frank*, 2 Russ. 450.

It has been recently decided in New York, that it is not a matter of course to commit the guardianship of the estate of a lunatic to those who are presumptively entitled to it upon his death, as his heirs or next of kin. But that they will be appointed the committee of his estate, where it satisfactorily appears to the Court that they are the persons who are the most likely to protect his property from loss. *Matter of Taylor*, 9 Paige, 611. 2 Barbour, Ch. Pr. 236, 237.

(c) In general, but one person should be appointed committee of the person. *Ex parte Rudlow*, 2 P. Wms. 635.

threats. How can this be met? what issue is proposed? It is incapable of being proved. The objection, that by answering the charge, instead of applying immediately, the remedy is waived, has no force. There is no instance of the application in this sort of jurisdiction, except the case *Ex parte Simpson* (1) in bankruptcy: but, if a charge is met by a positive denial, and cannot be proved, it ought on principle to be expunged; as it must be considered untrue. Had the application been made without a denial, what would have been the conclusion?

Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Wetherell*, for [* 223] * the mother and uncle of the lunatic, resisted the application; contending, that the subject of the charge, being relevant, cannot be scandalous; according to the distinction laid down by Lord Hardwicke, and followed by the Lord Chancellor in *Ex parte Simpson* (2) in most precise and correct terms: that the family were entitled to scrutinize the conduct of a stranger, offering himself as a candidate for the office of Committee, for which his character can be his only qualification; and that by joining in that inquiry, and going into an explanation and denial in the Master's Office, the remedy was waived; and the application came too late.

The Lord CHANCELLOR [ELDON].—No doubt is expressed at the Bar upon the jurisdiction to direct a reference to the Master to inquire into alleged scandal in an affidavit, filed in the Court, and offered to the Master; whether read, or not, I am not informed. I have reason to believe, that in my own decision *Ex parte Simpson*, and so in lunacy, I am sanctioned by precedents of Lord Hardwicke; but without that authority I should have thought it right to make the precedent. In a cause the Motion to refer the Bill or Answer for Impertinence or Scandal is of course; and that practice, the wisdom and justice of which are strongly demonstrated by what has passed this day, has its foundation in this; that it is impossible for the Court to look through the whole record, and itself determine upon such an application without the previous assistance of the Master. In cases such as this now before me, which are very rare, it is not surprising, that the application is made to the Court in the first instance: but in that case the Court ought to go no [* 224] farther than to see, * whether the passages complained of afford *prima facie* a ground, upon which the reference to the Master may be usefully directed.

To illustrate this: suppose an affidavit, not as to understanding and belief, but distinctly and positively asserting the truth of the proposition: yet I should determine at this moment with great hazard the question, whether even such an assertion was impertinent, irrelevant and scandalous, recollecting that its relevancy or impertinence must be determined with reference to its connection with all these other affidavits, above seventy in number.

(1) *Ante*, vol. xv. 476.

(2) *Ante*, vol. xv. 476. See v. 656, and the note.

The point, upon which, as unconnected with the rest of the case, this application is the strongest that has yet occurred, is that the assertion is, not positive, but mere understanding and belief. There are but two modes of proceeding : either by sending it to the Master now, to look into the whole case, and see, whether this is impertinent, or not ; or to hear the other petition, which will inform me of the whole case : and then do in this instance what I hope the Court will not do again, determine myself, whether this is impertinent and scandalous. To the former course this objection is taken ; that these charges are answered ; and upon that point the case *Ex parte Simpson* (1) is not an authority ; as, if there were affidavits in answer in that instance, my attention was not called to the circumstance. On the other side it is said to be reasonable to attend in this stage of the business to this ; that if the scandalous matter, being denied, is permitted to stand upon the record, that denial might be made the subject of an indictment : then the question of materiality would be before the Jury ; and it * would [* 225] be rash to preclude the possibility of so inquiring into that fact. The Counsel, feeling the difficulty, propose, that the proof shall be gone into, and, if it fails, the scandalous matter shall be struck out : but I do not know an instance of expunging scandalous matter, after it has been answered. The case has gone so far, that I think it better to proceed.

After some opposition it was agreed, that the other petition should proceed (2).

Sir Samuel Romilly, Mr. Leach, and Mr. Wetherell, in support of the Petition by the Mother and Uncle.—In all cases certainly the strongest presumption is, that the wife of a lunatic is the most proper Committee of his person, as most capable of administering to his comfort, and most likely to alleviate his calamity : nor is this application to appoint his mother and uncle made with any intention to deprive him of the benefit of his wife's attendance ; for securing which some direction is even desired ; but, if your Lordship finds her acting upon a system of her own, inconsistent with that recommended by the best advice, her treatment so injudicious as probably to promote his disorder, whether from her being under the direction of another person, or acting with her own inclination from want of judgment, or, if from motives of mistaken affection, that affection is the strongest reason against her appointment as the Committee, to have the direction, where he is to be placed, what indulgence he is to have, &c.

* With respect to the appointment of Committee of the [* 226] estate, the principle, upon which in *The Duke of Newcastle's Case* a larger maintenance than usual was given to the mother, that being considered as most beneficial to the infants, applies. The relations of the lunatic are not without some specific ground to be discarded in this appointment, and have their affliction

(1) *Ante*, vol. xv. 476.

(2) This branch of the case is published by Mr. Collinson on Lunacy, vol. i. 214.

increased by the invidious imputation, which must be the consequence, for the mere purpose of introducing a stranger, with affected benevolence intruding himself into that office. The feelings of relations are not to be put in competition with the benefit of the lunatic; but a relation cannot be disqualified, unless proved to be unfit.

The Lord CHANCELLOR [ELDON].—As I should have felt great pain in exposing this lady to the possible consequences of being the sole Committee of her husband, I am glad, that is not pressed; and think the Master quite right in not appointing her the sole Committee. All, who are acquainted with the subject, know, that a person, who fills this office, in the exercise of which affection must be tempered with firmness, is often under the necessity of doing what is unacceptable to the object of his care; and a rooted, though unjust, aversion is the usual effect of a line of conduct, ungrateful perhaps to the feelings, but essential to the recovery.

Difficulty arises from the different views of these parties: but, considering the circumstance, by which the wife is influenced, meaning extremely well, but much mistaken, and misled by circumstances she cannot understand, though her affection may produce a wish to be constantly with her husband, she must entrust his medical care and treatment to some persons, in whose judgment and humanity she can confide; *and, as I cannot be induced to take from her the care of his person, I must declare, that it is for them, not for her, to determine, what is medically right or wrong. I am therefore glad that Dr. Waddington is willing to co-operate with her; and shall appoint them jointly Committees of the person.

Upon the other question, as to the appointment of a Committee of the estate, I differ from the Master, but not upon any ground affecting the character or conduct of the person appointed. If Dr. Waddington is excluded upon the grounds, alluded to in argument, connected with dislike, having its foundation in unkind conduct, I am not in possession of the reasoning, that induced the Master to make him Committee of the person; but there is no ground whatever in the conduct of Dr. Waddington and others, requiring, with reference to either the happiness or the interest of the lunatic, properly regarded, that his uncle should be excluded from the situation of Committee of either the estate or person. It is not a judicious mode of dealing with his calamity by prying too minutely into family quarrels, perhaps founded in affection; and raking up every little bickering, to exclude different relations, until, as in this instance, I may be called upon to forget that any of them are related.

No ground is laid for making the affection of this gentleman the occasion of severance from all his relations, and taking from the family that office, of which they are never without a pressing necessity in the discharge of a painful duty deprived. Upon the attention, due to the family of the lunatic on his account, I am not authorised to suppose, that all his connections, by blood and affinity, cannot

supply a person, who will take care of his estate. The governing principle has always been, that, if such a person can be found, the influence * of the family, which ought to be confined within its own circle, is not to be thus transferred to a stranger. [* 228]

Therefore either Dr. Waddington must be the Committee, or he and Mr. Hasted joint Committees of the estate.

1. THE introduction of scandalous matter into judicial proceedings is an indignity offered to the court whose records are made the vehicle for circulating the scandal; it is probably, on this ground, that it has been held generally, and without adverting to the possible exception suggested in the principal case, that a reference for scandal will be granted at any time: see, *ante*, the notes to the *Anonymous case*, 5 V. 656, and the note to *Coffin v. Cooper*, 6 V. 514.

2. In the appointment of committees of a lunatic, consanguinity, though properly entitled to consideration, confers no positive right; it is in the discretion of the holder of the great seal, or other administrator of this branch of the prerogative, to appoint whomsoever he may think the fittest persons: *Lady Mary Cope's case*, 2 Cha. Ca. 239. The old rule which excluded, as a matter of course, the next of kin from the office of committee of the person, whenever such next of kin was also heir to the lunatic's estate, has been long exploded as being unsuitable to any but the most barbarous times: *Dormer's case*, 2 P. Wms. 263; *Ex parte Ludlow*, 2 P. Wms. 638; *Ex parte Cockayne*, 7 Ves. 591.

THE BANK OF ENGLAND, *Ex parte*.

[1811, August 16.]

THE Bank of England not entitled to prove under a Commission of Bankruptcy by a Clerk without a Power of Attorney.
A General Order to enable them proposed.

THIS Petition prayed an Order, that the Commissioners under a Commission of Bankruptcy against Thomas Lears, of Bristol, may be ordered to receive the affidavit of William Harris, a Clerk of the Petitioners, as proof of a debt of 210*l.*, due to them by the bankrupt, as the drawer of three bills of exchange. The petition was supported by an affidavit of the Clerk of the Bank as to the practice of the Bank to prove debts in this manner; that the department of discount and presenting bills for payment is conducted by Clerks, without the interference of the Directors, after the bills are passed for discount; the Clerks, being acquainted with the circumstances, are the proper persons to make the proof; the Directors, if it was practicable for them to attend, not having sufficient personal knowledge of the transaction.

Sir *Arthur Piggott*, in support of the Petition, relied on the practice, as stated in the affidavit; and said, an Order was made in 1804 to admit such proof.

* *Mr. Cooke*, against the Petition, said, the Bank could [* 229] no more prove in this manner than any other corporation;

the rule, that a Clerk, proposing to prove, must produce his authority, is equally applicable to them.

The Lord CHANCELLOR [ELDON] said, the Commissioners were right in taking the objection; and proposed to remove the difficulty of requiring the Bank to execute a power of attorney in every case, where a debt is to be proved in bankruptcy, by a General Order, that the proof may be received by a person, swearing, that he is a Clerk of the Bank, and is authorized: the Commissioners will thus be at liberty to receive the proof under that General Order, and the Bank will be secured by that affidavit from having that proof made without authority (1).

AN application similar to that made in the principal case is reported in 1 Rose, 142, where we are informed, that the proof tendered on the part of the Bank, through the medium of their clerk, was ordered to be admitted without the production of a power of attorney from the Bank to the clerk. But the general order which the Lord Chancellor proposed in the principal case to make, was not completed; for, when the petition in *the matter of Stephens* (reported in 1 Swanst. 10, and 1 Wilson's Ch. Ca. 295) brought forward the same question, seven years afterwards, it was contended that the Bank of England is not authorised to prove debts under commissions of bankruptcy by a clerk, without having obtained from the Lord Chancellor a general order for that purpose, or a particular order for the proof of the individual debt. Lord Eldon said, the Bank, like every other corporation, is entitled to prove a debt under a commission of bankruptcy, by the affidavit of a person duly authorized by a *general power of Attorney*, and to vote in the choice of assignees by a person duly authorized by a *special power of attorney*, under their common seal. His lordship went on to say, again, that it might be proper to make a general order relative to all corporations, but that a general order could not be made on a particular petition in a particular bankruptcy.

(1) In a subsequent case, 1 Swanst. 10, it is decided, that the Bank, as a Corporation, are entitled to prove by any of their Clerks or Agents, competent and duly authorized for that purpose; and by Mr. Swanston's note, 13, the Order in the case, 1 Rose, 142, in the year 1810, appears to have directed the Commissioners to receive the proof of the Clerk, as proof of the debt, without production of the authority from the Bank, "to make *such affidavit*:" that is, without a special authority; and so the Order in the other case, (1 Swanst. 12,) adds, that the proof by the Clerk shall be received without production of the authority from the Bank to him to prove "*the said debt*." In this case the objection appears to have been, that the proof was tendered without even a general authority; and, as it was by a different person from the Clerk usually employed for this purpose in town, and probably under a Country Commission, perhaps a Clerk was sent to Bristol, without attention to the necessity of an authority; which, though, as Mr. Christian (2 Christ. Bank. Law, 477,) justly observes, it does not seem necessary to make him a witness, is essential to enable him to tender the proof for his principal; which at once discharges an Action. Whether these cases may be thus reconciled is now of little importance: the late Act of Parliament, 6 Geo. IV. c. 18, s. 46, enacting, that all bodies politic and public companies, incorporated or authorized to sue or bring Actions either by Charter or Act of Parliament, may prove by an agent; provided such agent shall in his deposition swear, that he is such agent as aforesaid, and that he is authorized to make such proof.

SOLLERS, *Ex parte* (1).

[1811, AUGUST 16.]

SHORT bill in the hands of a bankrupt, as agent, and not by consent or the course of dealing considered as cash, to be returned; or the proceeds, received after the bankruptcy; though the bill was due previously, and retained so as to discharge the indorser.

THIS Petition, presented by the Blandford Bank, stated, that on the 15th of May, 1810, the Petitioners sent to Burroughs, a banker in Salisbury, who afterwards became a bankrupt, a bill for *250*l.*, dated the 10th of May, and payable two months [*230] after date, for which the petitioners gave value; and they authorized the bankrupt, as their agent, to receive the amount. On the 13th of July, when the bill became due, the bankrupt had stopped payment; and the Commission issued three days afterwards. On the 8th of August the bill was paid by the person, upon whom it was drawn, to the provisional assignee; who obtained possession of it under the Commission.

The Petitioners further stating, that the Commissioners refused to permit them to prove the amount of the bill upon the ground, that it was not received by the bankrupt previously to the bankruptcy, prayed an Order upon the assignees to pay over the amount of the bill; or that the petitioners may be at liberty to prove it.

Mr. *Wingfield*, in support of the Petition, desired the same Order, that was lately made upon a Petition *Ex parte Sargent* (2), that short bills in the hands of a banker at the time of his bankruptcy should be returned, unless by consent, or by the course of dealing, they were considered as cash; to be ascertained by an inquiry before the Commissioners; and in the latter case the proof to be admitted.

Mr. *Heald* and Mr. *Wray*, for the assignees, took the distinction, that this bill was due before the bankruptcy; and the bankrupt by keeping it had made it his own.

The Lord CHANCELLOR [ELDON] said, this was within the same rule as the case mentioned; though the bankrupt had made the bill his own, so as to discharge the indorser, if the bill proved good for nothing, yet, the party, who may in that [*231] case renounce the bill, may, if, as in this instance, it proves good, insist upon the benefit of it.

The same Order was made as in *Ex parte Sargeant*.

1. This case is likewise reported in 1 Rose, 155.

2. As to the doctrine with respect to short or unpaid bills, remaining in the hands of a party to whom they were remitted as an agent at the time of his bankruptcy, see, *ante*, the notes to *Ex parte Sayers*, 5 V. 169.

(1) 1 Rose's Bank. Cases, 155. This general right to have short bills, in the hands of a bankrupt, returned was established upon great consideration in the cases of the Hull and other Country banks in the bankruptcy of Boldero & Co. *Ex parte Pense and others*, post, vol. xix. 25, and the references. 1 Rose's Bank. Cas. 243, 254, 280.

(2) 1 Rose's Bank. Cases, 153.

ARUNDEL, *Ex parte* (1).

[1811, AUGUST 16.]

JUDGMENT in an Action against a bankrupt, not followed by Execution, the bankrupt having surrendered in discharge of his Bail, not an election to proceed at law, preventing the Plaintiff's going in under the Commission.

THE Petition prayed, that the petitioner may be at liberty to call a meeting under a Commission of Bankruptcy, and to prove his debt; and that the Certificate may be stayed in the mean time. The Petitioner, his proof being rejected by the Commissioners, obtained a verdict in an action against the bankrupt; entered up judgment; and sued out a writ of *Capias ad Satisfaciendum*. The bankrupt surrendered in discharge of his bail; but was never charged in execution by the Plaintiff.

Mr. *Richards* and Mr. *Montague*, in support of the petition, insisted, that the writ being sued out merely as a necessary preliminary step to fixing the bail, the petitioner could not under these circumstances be considered as having made an election to proceed at Law: and the Lord Chancellor had so decided in *Ex parte Cundall* (2).

Sir *Samuel Romilly* and Mr. *Hart*, for the bankrupt, and [* 232]. Mr. *Cooke*, for the assignees, observed, that since * the case of *Ex parte Cundall* a considerable alteration in the Law upon this subject had been made by the late Act of Parliament (3); declaring, that it shall not be lawful for any creditor, who has brought an action against the bankrupt to prove a debt, or have a claim entered upon the proceedings, without relinquishing such action; and that the proving, or so claiming, a debt, shall be deemed an election to take the benefit of the Commission; so the creditor, bringing this action, under which the bankrupt has submitted to go to prison in discharge of his bail, must be taken to have elected to proceed at Law.

The Lord CHANCELLOR [ELDON] made the Order according to the prayer of the petition.

1. This case is likewise reported in 1 Rose, 143.

2. As to the election of a creditor, whether to proceed at law, or to take the benefit of a commission against his debtor, see, *ante*, the note to *Ex parte Cundall*, 6 V. 446.

(1) 1 Rose's Bank. Cas. 143.

(2) *Ante*, vol. vi. 446.

(3) Stat. 49 Geo. III. c. 121, s. 14.

HANSON, *Ex parte* (1).

[1811, August 17.]

Set-off in bankruptcy of a debt of the bankrupts to one partner separately against a joint debt of him and his partner on their bond to secure the separate debt of the former (a).

THIS Petition came on upon the Master's Report under the Order, made by Lord Erskine (2), allowing the petitioner's claim to set off the debt, due from the bankrupts Castell and Powell to him on his separate account, against what was due to them upon the joint bond of him and his partner Williamson, and directing inquiries. The Report stated the result of the accounts and the circumstances; in effect, that, after giving credit for the sum of 209*l.* 15*s.* 7*d.* due to Hanson and Williamson on their banking account, the sum of 662*l.* 9*s.* 9*d.* was due to the bankrupt's upon the loan of 10,000*l.* to Hanson, secured by the joint bond of himself * and [* 233] Williamson; which sum was paid by Hanson, except 833*l.* 17*s.* 7*d.*; which he claimed to set off, as due to him from the bankrupts on his separate account; for which sum the assignees brought an action.

The report also ascertained, that three sums, amounting together to near 400*l.*, were transferred by Benjamin Hanson, who was taken into the partnership of Hanson and Williamson, from their joint account with the bankrupts to his private account without authority; which sums were not included in the balance of their banking account.

The LORD CHANCELLOR [ELDON].—With regard to one object of this petition, complaining, that the joint estate of Hanson and Williamson has been charged as if these sums, transferred to the separate account of Benjamin Hanson, were taken out of the joint estate properly, that they were not properly transferred, and ought to have been allowed in the balance of the joint account, my opinion is, that those transfers from the joint estate of Hanson and Williamson to the separate account of Benjamin Hanson were made without any authority: the assignees are therefore over paid; and those sums must be refunded.

As to the right, claimed by the elder Hanson, to deduct from the joint account and set off in the action, brought by the assignees, the sum of 833*l.* 17*s.* 7*d.* due by the bankrupts to him on his separate account, I am satisfied he had that right; and the declaration of Lord Erskine's Order upon that is proper under the circumstances, upon this ground: the joint debt was nothing more than a security for the separate debt; and upon equitable considerations a creditor, who has a joint security for a * separate debt, [* 234] cannot resort to that security without allowing what he

(1) 1 Rose's Bank. Cases, 156.

(a) See, *ante*, note (a) S. C. 12 V. 346.

(2) *Ante*, vol. xii. 346. See the note, iii. 248, *Ex parte* Quintin.

has received on the separate account, for which the other was a security.

The action of the assignees must therefore be restrained, and the securities deposited must be delivered up : but in a case so complicated I shall not give costs.

SEE, *ante*, the notes to *S. C.*, 12 V. 346.

THOMPSON, *Ex parte* (1).

[1811, AUGUST 19.]

CONSIGNMENT with authority to sell, to reimburse advances on the consignment ; any deficiency to be made good ; and the surplus, if any, restored.

Part of the goods being sold to the consignors, proof under their bankruptcy was limited to the balance of the original advance.

By a memorandum in writing, executed in April, 1810, Carson and Distell agreed to consign sugars, &c. to Heywood and Gladstone, with authority to sell : the proceeds to be applied in repayment of advances made on account of the goods, deducting commission, interest and other charges : any deficiency of the proceeds to be made good by Carson and Distell ; and the surplus, if any, beyond the advances to be repaid to them.

The property was accordingly delivered, and advances made to the amount of 2400*l*. Soon afterwards a considerable part of the goods was sold to a broker for Carson and Distell upon bills, accepted by them for 10,648*l*. ; and a farther sale was made to the same parties for 6220*l*. Carson and Distell became bankrupts ; not having paid their acceptances, nor the price agreed for the goods last sold. Heywood and Gladstone were admitted to prove [* 235] under the Commission the whole amount of the bills * and the sum of 6220*l*. ; and the object of this petition was to expunge the proof of the excess beyond the balance of the advances remaining due : 13,000*l*. having been received from other persons.

Sir *Samuel Romilly* and Mr. *Montague*, in support of the Petition. — The consent of these creditors to let the bankrupts become the purchasers of the goods deposited cannot raise the demand higher than the money actually advanced by those creditors ; who cannot be considered as vendors of these goods to the bankrupts. If this attempt should prevail, to receive the dividends upon 1600*l*., until they shall be repaid 10,000*l*., the whole sum remaining due upon their original advance, the consequence will be, that in this way a man may prove three times the amount of his debt ; and this contrivance will frequently take place : security will be taken in double

the amount of the debt upon the contract, for the purpose of proving in the event of bankruptcy; in which event alone it can be of any use. The creditors parting with the goods, that instant ceased to have any lien upon them; and being brought back to the possession of the bankrupts, who had the order and disposition of them, credit was acquired by that apparent ownership.

Mr. *Hart* and Mr. *Cullen*, for the creditors *Heywood* and *Gladstone*.—These creditors for advances made upon the deposit of these goods, selling part of them to the bankrupts, took legal securities for the amount; and to that amount the bankrupt's estate has been increased. The petition insists, that under this transaction, instead of their whole security, the right to prove is limited to the difference * between the sum of 13,000*l.*, received from [* 236] third persons and the whole advance of 24,000*l.* The proposition on the other side, certainly raising a new question, is, that, the bankrupts having bought these goods, and given legal securities upon that purchase, the vendors may avail themselves of those securities; and, until they have had the benefit of those securities, to the extent of obtaining 20*s.* in the pound upon the actual balance, the equity claimed cannot take effect.

The Lord CHANCELLOR [ELDON].—I think, this proof must be expunged. *Heywood* and *Gladstone* agree to become creditors by simple contract of these bankrupts for 24,000*l.*; and have sugars placed in their hands to be sold. Upon the terms of the agreement, as no question upon them arises before me, I make no observation. The import *prima facie*, I should say, is a sale to others. The necessity for that construction results from this; that, if the goods can be immediately sold to the persons, who deposit them, for the full amount of their value, instead of the debt, a tradesman borrowing 20,000*l.*, may thus entitle his creditor to prove 40,000*l.*, and take 8*l.* per cent. upon the advances, and all this Commission besides. With such consequences how is it possible to contend, that this was a sale; or that these goods got back to the bankrupts upon any other principle than a return of goods? The effect is, that the parties are restored to their original situation: the one immediately becoming again debtor for the difference between the sum of 13,000*l.* actually paid and 24,000*l.*; and the lien of the other being discharged by the creation of a new debt.

The Order was made for expunging the proof.

1. This case is likewise reported in 1 *Rose*, 165.

2. A creditor is allowed, in bankruptcy, to avail himself of all collateral securities, till he has received twenty shillings in the pound upon his actual debt: but, though a creditor who holds a security upon which several parties are liable, may, if no part of the debt for which the security was given has been paid, prove the whole amount under several commissions against every one of those parties, and receive dividends on each of such proofs, not exceeding in the whole his debt; still, proof against the estate of one party liable must be reduced, whenever, previously to such proof, payment in part has been received (or, it seems, a dividend declared) from the estate of another party: see, *ante*, note 1 to *Ex parte Bloxham*,

5 V. 448. This obviously just principle, that proof of a larger sum than is actually due, ought not to be admitted, was, of itself, a sufficient ground for the order made in the present case, even if the terms of the agreement in question had been less open than they actually were to serious objections.

[* 237]

HIAMS, *Ex parte*.

[1811, JULY 17, 18.]

COMMITMENT by Commissioners of Bankruptcy for an unsatisfactory Answer of the Bankrupt illegal: the recital of the previous examination not correctly stating the admissions, upon which the question was founded.

Re-examination directed: the Bankrupt being in custody also under a surrender by his Bail.

Whether a person committed by Commissioners of Bankruptcy can be discharged on petition without a *Habeas Corpus, quære*.

THIS petition presented by a bankrupt, prayed, that the petitioner may be discharged from imprisonment under a commitment by the Commissioners; or that the question, upon which he was committed, may be put in a form more simple. The bankrupt was committed for not fully answering to the satisfaction of the Commissioners the following question:

"As you admit, that you have received goods within the last eighteen months to the amount of 14,000*l.*, that you have suffered a loss and incurred expenses with respect to those goods to the amount of about 900*l.*, as detailed in the Schedule C., that you have no books or papers relating to the losses, so stated in the Schedule C., except the invoices of the purchases of those goods, that you have never kept any books of account except some little memorandum books, which have been destroyed, that a part of the goods, upon which the loss had been sustained, had been sold abroad by auction, the accounts of which sales you formerly stated you carried to the Continent, and destroyed them in an enemy's country, at the same time giving as a reason for taking them to the Continent with you, that they would assist your judgment in selling the goods you had then with you, but upon being farther asked respecting those accounts you stated that you brought them to England, and that they must have been destroyed, when the sheriff took possession of your house, but upon being asked, whether you had the least reason to suspect or believe, that such accounts had been destroyed by any

[* 238] person, acting under the sheriff, you *stated, that your reason was, that you did not find them, when you came from abroad, that you gave no particular directions about them, that you did not inquire, whether they had been destroyed by the sheriff's officer, or any other person, have you now any account to give respecting those sales?"

Answer. "No: no other account: but the only papers I brought

home the second time, which was the latter end of March or the beginning of April, were the papers about the goods, sold by auction."

The petition farther complained, that the Commissioners refused to examine two persons, who offered to prove the losses, sustained by the petitioner in selling these goods; and that the Commissioners refused to compel the Solicitor to produce letters, which he said had been received from Heligoland; praying, that they may be directed to proceed to the examination of those persons; and that the Solicitor may be ordered to produce all the letters upon oath.

The bankrupt by his affidavit stated, that, if the question had been divided, he should have answered, that the accounts of sales in March 1810 he had brought to England; and had not been able to find them; and believed they had been lost by means of the execution, put into his house, while he was abroad; that he had made inquiries for them; that he had given to his assignees the name of Mitchell, the auctioneer, who sold the goods; and they had promised to send to him for copies of these accounts; and as to the sales in April and May after his return from England to Heligoland, that he had taken them and the invoices and his memorandum books to the Continent; and for fear of death he had, as he believed all the other English traders then upon the Continent had done, destroyed them, while upon the Continent, to prevent a discovery; and farther as to the accounts of sales by auction in April and May, he had given the assignees the name of the auctioneer; and they had promised to send to him for copies of these accounts also. [* 239]

The Petitioner also complained of the conduct of the Solicitor in not taking a part of his answer; viz. that there was a mistake. The affidavit of the Solicitor justified that thus; that on inquiry it was merely an assertion, that the Solicitor was under a mistake in supposing, that the petitioner had not given a true account; not a mistake as to any fact he desired to correct.

The previous examination of the bankrupt.

"The accounts are made out from memory, and not from any written papers. I have no written papers in my possession, which either explain or confirm the items charged in Schedule (C). I was obliged to destroy all my papers relating to that account in an enemy's country. When I went into an enemy's country I intended to return to Heligoland, before I came to England. I took the papers with me to assist my judgment in selling the goods. I took no other papers but what would assist me in selling my goods.

Q. "Where are the accounts relating to the sale of goods at Heligoland in March 1810, to the amount of 3400*l.* upon which you state a loss to have been sustained of 900*l.*?

A. "I have no accounts. I do not know, that I had any.

Q. "Do you believe you had accounts from the persons, who sold the goods by auction, or not?

A. "I do believe I had; and those accounts I brought home to England.

Q. "Where is that account?

A. "It must have been destroyed, when the sheriff took possession of the house.

Q. "Have you the least reason to suspect or believe, that such accounts were destroyed by any person acting under the sheriff?

A. "I have reason, and my reason is, that I did not find them, when I came from abroad. I left England in April. The sheriff's officers took possession in May; and did not return till the end of October. I have no other reason to suspect, that the papers were destroyed, but what I have stated. I have never applied to any person, who was in possession of my house, to learn, if any papers were destroyed. I have never searched in my old house: which is inhabited by other persons.

Q. "How do you know, they are not now in your old house?

A. "When I came home I found my family in lodgings; having removed according to their account all my papers; among which I did not find those accounts.

Q. "When did you first compute the loss sustained upon the parcel of goods before alluded to?

A. "At Heligoland, in March 1810.

Q. "Did you make out a regular account of the loss at that time?

A. "The mode, by which I ascertained my loss, was by deducting the produce from the invoice and expenses.

Q. "You have stated from your memory, that your loss upon the goods sold at Heligoland in March 1810 was 900*l*.; state by what means you are enabled to ascertain that amount as lost?

A. "I took the stock in March last, and left the remainder [* 241] of the goods in Henry Michael's warehouse; and by that means I found I was 900*l*. deficient. I made no calculation, when I dictated my last account: but I remember, that I lost 900*l*., from the calculation I made, when there; and when I took stock after the sale, I brought the whole account, relating to the calculation, to England; and that must have been lost in my old house, when the Sheriff's officers went in. I remember none of the particulars of that account: but I know, that I lost 900*l*. I can give no particulars: but most likely Michael can. The whole of the goods sold was 3400*l*.. The papers left by me, when I went abroad the second time, were left all together in the counter of the shop. I gave no particular directions about them. When I came back, Mrs. Hiams had got them altogether in a bag; and said she had put them there. I did not inquire, when she put them in the bag (1). Schedule C is an account of the loss and expenses incurred in respect of the goods, for which the debts in Schedule A

(1) Thus far the Bankrupt's Examination was originally taken in private. The Examination, where that course is necessary, is always open to the creditors at the public meeting.

were contracted. I have no papers relating to those losses except the invoices of part of the goods delivered to the assignees. I had no books of account of transactions previous to April 1801, when I compounded. The account of losses in Schedule C is made up from memory. I have no accounts relating to it. I have never kept any books of account. I have no books of account relating to my transactions previous to April 1806, when I compounded with my creditors. As near as I can recollect, the amount of goods sold by me since April 1806 was nearly 23,000*l*. (repeating, that the account of the *losses in Schedule C is made up from [*242] memory; and he had no accounts, and never kept books, &c.) The first parcel of goods I exported to Heligoland amounted to about 3000*l*. sold at about the cost price. I neither lost nor gained by them. The second time I went to Heligoland I sold 3000*l*. worth of goods at a loss of 900*l*. The third time I went I took goods to the amount of about 5000*l*. Upon the last parcel of goods of 5000*l*. I also sustained a considerable loss. There was a loss of 900*l*. upon the second parcel: part of those I sold by auction: the remainder privately. Part sold in the packages; as I took them out: the remainder by retail in small quantities. I have not procured any of the accounts relating to the sale of those goods. The agent for the assignees told me, that he would get them: a Mr. Swiger: I mean, that Mr. Swiger told me he would get the accounts again. I do not mean, that he would get the accounts he had once. Those accounts, showing that loss, I brought home with me; I have not now got them: I have inquired after them since the last time I was examined, (stating the inquiries he had made:) when I sold the second parcel of goods at a loss of 900*l*., I had a farther parcel of goods, which I could not sell, and I left them. The goods I sold at a loss of 900*l*. consisted of hosiery, prints, muslins, a few boots and shoes. The goods I left behind were of the same sort. The second time I took the boots and shoes; the first time I did not. I had some shalloons the first time: the second time I had none. I had buttons the first time. The difference between the first parcel of goods I exported and the second was boots and shoes and shalloon goods. I had them the first time, and not the second. I made a mistake: the whole of the goods I had the first time were prints, muslins, and hosiery. The second parcel consisted of the same articles as the first with *the addition of shalloon [*243] goods, (stating some others.) The amount of the goods in my second adventure, which were not in my first, amounted to between 3 and 4000*l*. The greater part of the 5000*l*. worth of goods, taken out by me the third time, were different from those I had taken out upon the former occasions. The third parcel of the goods were of the same nature as the second: but many of them were of different prices."

The examination concluded with the question, upon which the commitment took place.

The Lord CHANCELLOR [ELDON] expressed doubt, whether the bankrupt could be discharged upon petition.

Sir *Samuel Romilly*, Mr. *Cullen*, and Mr. *Montague*, in support of the Petition.—This is the only course, by which the admissions of the bankrupt, as stated in the warrant, can be compared with the examination upon the proceedings. If the Judge, before whom a person committed is brought by *Habeas Corpus*, cannot go out of the return, Commissioners of Bankruptcy have a power, which no other Judge has, or ought to have, to commit upon the answer to a question, framed on a recital of supposed contradictions; and if the bankrupt cannot explain them, he can never be discharged. Lord Holt's opinion was, that the bankrupt ought to have the questions put in writing, and time to answer. He could not understand this long question; and the effect of the examination is not correctly collected by the recital. By this mode of putting the question the bankrupt is perplexed and entangled. The view, with which the question is put, should have been distinctly stated; that [* 244] the whole story was improbable; * or that there was palpable contradiction; in which case, the two inconsistent answers being placed before him, he should have been required to reconcile them.

Mr. *Hart*, Mr. *Leach*, and Mr. *Heald*, for the Assignees.

The Lord CHANCELLOR.—This case is in the narrowest compass. The question, whether the commitment upon the bankrupt's answer was proper, depends entirely upon the point, whether the admissions, assumed in the recital, are correct. If the question was proper, and the answer satisfactory, the bankrupt is entitled to his discharge in some form: but, the Commissioners having this sort of authority expressly given them by the Act of Parliament, a doubt has been handed down by tradition, whether the Lord Chancellor by that authority, which he has in bankruptcy, can deal with the commitment, as he, as Lord Chancellor, and the Judges, can upon the return to a *Habeas Corpus*; and I find, upon inquiry at the Office, that for the last twenty-seven years this sort of interference has been uniformly refused. The difficulty, when started, has been avoided by taking the other course, not open to objection; and in some instances it has been found salutary to send it again to the Commissioners to be reviewed; the Lord Chancellor not dealing directly with the commitment: but by his advice and order impressing upon the Commissioners the expediency of reconsidering, whether they were perfectly right in the exercise of their authority (1).

[* 245] In the view I have * taken of this case I cannot reach the conclusion, that, if the truth of the assertions, contained in the preface to this question, can be established, the question was improper. I perfectly understand it, and the drift of the Commissioners in putting it; and the fairest way of putting it seems

(1) *Oliver's Case*, 2 Ves. & Bea. 244; 1 *Rose's Bank Cases*, 407; *Taylor's Case*, ante, vol. viii. 328; see the notes, 330, 3.

to be this, with a recital, summing up the previous examination. Supposing therefore those assertions to be true I could not discharge upon a *Habeas Corpus*.

One of the affidavits represents, that these admissions were read over to the bankrupt, one by one; and he admitted that to be his meaning (1). Taking him even to have stated that, yet, considering the nature of these questions, and of the evidence given by himself, I am not sure, that I could, even after it was so put to him, safely conclude, that he had, as he says, made those admissions. His evidence, inconsistent and unsatisfactory as it is, does not appear to me to be so represented in these prefatory admissions, as to form the foundation of a commitment. I do not think, that he has so predicated, as is asserted, with respect to all the papers. It is not quite clear, that, if the questions and answers were distinctly stated to him, he might not reconcile them; that the result would not be, that some papers were destroyed on the Continent; and some relating to the transactions of March, were brought over here, and lost: a conclusion, which receives countenance from his answer as to the mistake.

Under a persuasion, that the Commissioners meant to do their duty, I propose to intimate to them, which will be sufficient without an Order, that they should review this case, and re-examine the bankrupt forthwith: but if pressed to discharge him, doubting, * whether I can upon petition, I will have that [* 246] ascertained; and, if the writ of *Habeas Corpus* should be necessary, I will issue it immediately.

The bankrupt having been surrendered by his bail, the question as to discharging him was therefore immaterial.

1. SEE, *ante*, the notes to *Taylor's case*, 8 V. 328, as to the power of commissioners, when they think the answers of a bankrupt have not been satisfactory, to commit him; and, also, as to the mode in which redress may be obtained, when that power has been unduly exercised.

2. It is no contempt of court, or violation of the statutory exemption of a bankrupt from arrest during his examination, for the bail of a bankrupt to surrender him in discharge of the bail during the period of examination; for such a surrender is not in the nature of an arrest upon an escape warrant (a process, the execution of which, the 117th section of the statute of 6 Geo. IV., c. 16, prohibits); but a party who has been bailed is considered as a prisoner in the custody of his bail, who are, in legal contemplation, his gaolers, and who, by surrendering him in their own discharge, do not arrest him *de novo*; it is under his previous arrest that the bailee is confined, and it would be hard if the bail, who, out of mere kindness, have made themselves responsible, for a time, in order to mitigate the inconveniences of that arrest, should not be at liberty to withdraw themselves from the risk, when they think fit: *Ex parte Gibbons*, 1 Atk. 238. And see the concluding passage of note 1 to *Ex part Hawkins*, 4 V. 691; see, however, also the concluding part of note 8 to *De Carriere v. De Calonne*, 4 V. 577.

(1) This fact was denied at the Bar.

BAKER, *Ex parte*.

[1811, August 23.]

ASSIGNEE in Bankruptcy charged with interest, not as partner in the bank, into which the money was paid by direction of the creditors, but for keeping it there too long.

INTEREST was pressed against the assignee under a Commission of Bankruptcy, as being a partner in a country bank, into which the money was paid by the appointment of the creditors, and remained there three years.

The Lord CHANCELLOR [ELDON].—The assignee resists the claim of interest on the ground, that the money really is, where the creditors directed it to be; and though, as a general regulation, it may be prudent in creditors never to order their money to be paid into a Bank, in which an assignee is a partner, yet if they do, it would be too much to say, he shall be charged with interest merely on the ground, that he has, as a banker, that possession, which the creditors have sanctioned.

[* 247] * Here is however another circumstance deserving attention. The assignee in this particular case is bound to use as much expedition for the benefit of the creditors by taking the money out of his own hands as if it was in any other Bank. He has in fact been making a profit at 5 per cent. about three years; and gives no satisfactory reason for keeping it so long. On that ground therefore, being an assignee, he must account with interest, to be computed upon the annual balances.

SEE the 102d, the 103d, and the 104th sections, of the statute of 6 Geo. IV. c. 16.

DAWSON v. CLARKE.

[1810, MARCH 30; APRIL 2. 1811, AUGUST 5, 23. *ANTE*, VOL. XV. 409.]

GENERAL devise and bequest to two persons, their heirs, executors, administrators, &c. upon trust in the first place to pay, and charged and chargeable with, all the testator's debts and funeral expenses, and the legacies after given.

Those persons, being afterwards appointed Executors, taking the absolute property, subject only to a charge, are entitled to the residue undisposed of, (including a legacy to a Charity, void by stat. 9 Geo. II. c. 36,) for their own benefit, against the claim of the next of kin; the whole property being personal. Upon their right, as Executors, *Quære* (a).

Trustees indemnified without a direction in the Will, [p. 254.]

Executor takes all, not meant to be disposed of; not all, that is not disposed of; as in the case of lapse; or being appointed Executor in trust, and no object expressed, [p. 254.]

Personal property bequeathed upon trust, which does not exhaust the whole: the Executor not entitled to the surplus, [p. 255.]

Devise and bequest upon trust: the devisee cannot take beneficially the real estate not exhausted: but a trust results for the heir: nor can the Executor, whether himself the trustee or another, take beneficially the surplus of the personal property (b), [p. 255.]

In the ordinary case of lapse the Executor will not take; though the subject is not given to any one else, [p. 255.]

THE Plaintiff appealed from the Decree, pronounced at the Rolls (1).

Sir *Arthur Piggott*, Mr. *Richards*, and Mr. *Bell*, for the Plaintiff.

—Though these persons are named as executors only in the concluding passage of the Will, not in the first devise, the whole is given to them upon trust. This is not therefore a trust as to part, and no disposition of the rest. The rule of construction has been long settled, that, where the whole property is upon the face of the Will *bequeathed to the executors upon trust, [* 248] that is a sufficient indication of the intention, that they shall not take the beneficial interest in any part of that property; and that conclusion is reasonable; as without a bequest in that form the executors would take the residue by operation of law. In all such cases, if no trust is declared, as in the instance of a blank left for a residuary clause (2), or if the trust fails by lapse or in any other way, the executors, being expressly trustees, cannot hold the beneficial interest; which must therefore go to the next of kin. Then can a partial disposition by a charge of debts and legacies make any difference; and can the executors claim the residue beyond what would satisfy that object; though they could not have taken the

(a) In most, if not all, of the States, the residue undisposed of goes to the next of kin. See, *ante*, note (a) *Nisbett v. Murray*, 5 V. 158; note (a) *Nourae v. French*, 1 V. 344. And the same principle has been adopted in England by the Statute William IV. cap. 40; 2 Williams, Exec. 1050.

(b) A surplus remaining, after certain trusts, goes to the heir and next of kin. See, *ante*, note (b) *Dawson v. Clark*, 15 V. 409.

(1) Reported, *ante*, vol. xv. 409.

(2) *The Bishop of Cloyne v. Young*, 2 Ves. 91.

whole? Real estate, had there been any, would have passed under these words, "all my estate and effects;" and there must have been a resulting trust for the heir-at-law, according to *Robinson v. Taylor* (1) and many other cases; which have established a principle, that is shaken by this Decree; proceeding upon this refined distinction, that the property is given to them in trust by their names; and in that part of the Will they are not called executors, or stated to be the persons afterwards appointed executors; who are to perform the office of executors by applying that very property, which is the subject of the bequest. A distinction, resting upon circumstances so slight and unsatisfactory, cannot be maintained.

The failure of the bequest of 1200*l.* to the charity by the effect of the Statute (2) is different from the case of a lapsed legacy. The executors, having the legal interest, are prevented by the law from applying the legacy according to the trust declared; [* 249] * and, being clearly trustees as to that, they cannot claim it as part of the residue, even if entitled to the residue beneficially.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Cooke*, in support of the Decree.—This Decree is right upon two grounds: first, that these persons are devisees and legatees under an express devise and bequest to them, their heirs, executors, administrators and assigns, for ever, subject to a condition, in the form of a trust or charge, to pay the debts and legacies: secondly, upon their right to the residue of the personal property in their character of executors. When they have complied with the condition, performing the only trust specified, they are entitled for their own use. The testator has used the strongest terms for passing the absolute interest, equivalent to a declaration, that they should take upon no other trust than that mentioned. The word "administrators" gives a more extensive interest than they would have merely as executors; which character would not pass to the administrator. This disposition must therefore be considered as if it was to other persons, not the executors; and they are entitled as devisees and legatees, subject to the only trust expressed.

The second ground is that, upon which alone the judgment at the Rolls proceeds. Courts of Equity have with considerable refinement held, that, if from any thing in the Will the inference is to be collected, that the testator intended to give away the residue, or farther, that he did not mean the appointment of executors to have [* 250] its legal effect, to give him the *residue, it should go to the next of kin (3). That intention has been inferred, among other circumstances, from a legacy to the executor. Upon this subject the inclination of the Court has at different periods fluctuated considerably between the executor and the next of kin; and

(1) 2 Bro. C. C. 589; *ante*, vol. i. 44; see the note, page 45.

(2) Stat. 9 Geo. II. c. 36.

(3) *Ante*, *Langham v. Sanford*, vol. xvii. 435, and the references, 443, n.; xix. 641; 2 Mer. 6; *Nourse v. Finch*, *ante*, i. 344, and the note, 362.

though, as is observed (1) in *Pratt v. Sladden*, some Judges have been disposed to give way to a very slight indication of intention against the executors, the modern decisions are quite the other way, in favor of the executor; of which *Bowker v. Hunter* (2) is a strong instance; and certainly some of the reasons, upon which the presumption has been raised, are not satisfactory; as the distinction between equal and unequal legacies to executors: the latter supposed to import an intention to give a larger portion to one: an object, that would be obtained by a legacy to one only.

The decisions against an executor, as being declared a trustee, have not gone farther than where that declaration has been in the very appointment of executors. The distinction, that the declaration of trust and the appointment of executors are in different parts of the Will, which has been treated as a refinement, is solid; and was noticed by the Master of the Rolls in *Pratt v. Sladden* as a case never decided (3). What can be the purpose of appointing them executors, except to give them the personal estate not disposed of; all the offices of executors being provided for in the specific trust declared in the first place? By depriving them of the legal effect of the appointment, unqualified by any declaration, that they shall be mere trustees of what they *take by it, the Court [* 251] would go much farther than any of the decisions; which have gone quite far enough; many intestacies being established much against the intention.

The charitable legacy cannot be distinguished from any other part of the property. Whether a legacy fails by the policy of the law, or by the common case of lapse is not material. The intention always is, that the residuary legatee, whether by express words, or by the mere appointment of executor, shall take all, that by any accident, from whatever cause, is not effectually disposed of.

Sir *Arthur Piggott*, in reply.—The affirmance of this Decree will introduce great confusion into a course of decisions, forming a rule, the original establishment of which, was not by any means so material as the maintenance of it, when it has prevailed so long; that, where executors are upon the face of the Will intended to take as trustees the whole personal property, whether that trust accompanies their appointment as executors, or appears in any other part of the Will, they shall not take beneficially. As they cannot be trustees for themselves, they must in that case be so far the next of kin. If these trustees had been mere strangers, this devise would not divest the interest of the heir-at-law, in so much of the real estate as was not required for the trust declared; and it is much stronger, as the trustees are not strangers, but the executors; and the trusts merely such as are peculiar to their office. No distinction could be made between the real estate, if the testator had any, and the personal

(1) *Ante*, vol. xiv. 197.

(2) 1 Bro. C. C. 328.

(3) *Ante*, vol. xiv. 196.

property; the same words being applied to both. This is a most circuitous and awkward mode of giving them the property; [* 252] which might have been easily and *effectually done simply by appointing them executors; in which character they must have paid the debts and legacies. If this is not a declaration, that they are trustees throughout, the words "in the first place" must be struck out of the Will. *Pratt v. Sladden* has no disposition to the executors, as in this Will. This case must be decided by the rule, to be now, not established, but maintained, which is clearly stated (1) by the Master of the Rolls, that, "if executors are appointed expressly in trust, they cannot take beneficially; for the trust is co-extensive with the office of executor;" and repeated in other words (2) by your Lordship in *Paice v. The Archbishop of Canterbury*; "If, as in the case in *Vesey* (3), the testator declares, that he gives it in trust, and then does not declare the trust, or, as in *Morice v. The Bishop of Durham* (4), the trust declared fails, the executors, being clearly intended not to have the benefit, must be trustees for the next of kin."

The Lord CHANCELLOR [ELDON].—The respect, that is due to the judgment of the Master of the Rolls in every case, and perhaps peculiarly in this, as well as an anxiety to be right upon such a question, calls upon me to look into several of the cases cited, before I pronounce my judgment; as I cannot read the Report without observing, that the mind of the Master of the Rolls was under an influence, formed upon decisions in other cases, with the circumstances of which I may not be acquainted. The ground, on which the judgment is put, I hope I may without disrespect say is not quite satisfactory.

[* 253] * There are two views of this case: first, whether these persons would take as devisees, if there had been any real estate, and as legatees (for it must always be remembered that the Will would have passed the property to them in those characters) for the purpose of discharging certain trusts expressed: leaving behind in them the beneficial interest in the property to the extent, in which those trusts do not effect it: and the question is, whether, these devisees and legatees taking as such only for the purpose of performing those trusts, there is a resulting trust in Equity for the heir and next of kin as to what is unapplied. Upon that question the Master of the Rolls has imposed upon me the necessity of looking into authorities; having, though he did not think it necessary to decide that question, adverted to several cases, and to one by name. That is a very material point; as if the judgment cannot be put on any other ground than that, which appears in the Report, it seems difficult to maintain it.

(1) *Ante*, vol. xiv. 198.

(2) *Ante*, vol. xiv. 370.

(3) *The Bishop of Cloyne v. Young*, 2 Ves. 91. See *White v. Williams*, 3 Ves. & Bea. 72.

(4) *Ante*, vol. ix. 399; x. 522.

The distinction taken upon that by the Master of the Rolls is, that in the case of *Robinson v. Taylor* (1), they took as executors ; and in the same character, in which the property was given to them, the trusts were imposed upon them ; inferring that from the manner, in which it was given, "to my executors hereinafter named."

I doubt whether that is sufficient for a farther inference than that it is a particular mode of describing individuals. That being a devise of real estate, as well as personal, the real property they could not take as executors ; and as to the real estate, those words could have no other effect than to describe individuals as the devisees.

* There are other words of the Will in *Robinson v. Taylor* [* 254] deserving attention ; "hoping they will see" the Will duly performed. As executors they could not do that as to the real estate ; and, as to the clause of indemnity to the trustees, some weight may be attributed to that : but it must be recollected, that in effect this Court infuses such a clause into every Will, though not directed : it comes therefore to little more than what a Court of Equity would have done without any direction. So little doubt was in that case entertained, that the executors could take no beneficial interest, being created trustees in that mode, that the great question was the other ; whether the form of the devise of the real estate, with a trust to sell it, had not so far converted the produce of the real estate into personalty, that the next of kin would take the whole ; and it would be very difficult to argue upon that mixed devise and bequest, that, if the residue of the real estate formed a resulting trust for the heir, the residue of the personal estate would not be so for the next of kin.

The proposition that the appointment of Executors gives him every thing not disposed of, is not correct. In the strongest way of putting that, it can only be what the testator does not mean to dispose of : in the case of lapse, for instance, though not disposed of, the executor would not take it : so, suppose the testator appoints an Executor in trust ; but does not express his object ; he might have relinquished that object, meaning it to go to his Executor : yet, in that instance, the Will expressing, that he intended a trust at that time, the Executor would not take in respect of the interest he had by virtue of his office (2).

The difficulties, I feel are, first, that I cannot think the distinction between this case and * *Robinson v. Taylor* [* 255] maintainable : secondly, that if the case is to be decided upon the latter ground, I do not apprehend the law of this Court to be, that, if personal property is bequeathed upon trust, and the trust does not exhaust the whole, therefore the executor shall take what is not required for the trust. There is no decision so settling the law. The decisions are the other way.

Where however the Will affects to dispose of both real and personal estate, if the law has been, as it will, I think, turn out, that,

(1) 2 Bro. C. C. 589.

(2) *Attorney General v. Tomkins*, Amb. 216.

the trust not exhausting the whole real estate, the devisee will not take beneficially, but a trust results to the heir, in the same case it will not be found, that the executor can take for his own benefit the surplus of the personal property; that gift to be operated by the mere effect of the nomination of him as executor; and I am not aware of any case, where it has been said, that if the whole personal estate is given to A., as trustee, who is afterwards appointed executor, he shall take beneficially, as executor, what he does not take for the purposes of the trust; he being the legatee of that personal property: that is, there is no case, in which the nomination of executor operates as a gift of the personalty beneficially in Equity to him, the Will containing a bequest of the whole personal estate; and there is no difference, whether that is a bequest of the whole personal estate to him, or to another individual.

The ordinary case of lapse, that the executor will not take, though the subject is not given to any one else, proves this: that if these legatees had not been the executors, the executors clearly would not have taken the personal estate, given to these legatees; and then the question is, whether they shall take it, as they are the executors: though they would not, if other persons were the executors.

The first point therefore is very material; upon which I [* 256] * have not the benefit of the opinion of the Master of the Rolls; and as to the second, if the judgment cannot be put upon any other ground, I cannot at present say, I am satisfied with the principle, upon which it is decided.

Aug. 5th. The Lord CHANCELLOR [ELDON].—I am anxious to look at the case of *Robinson v. Taylor* in the Register's Book. The opinion of the Master of the Rolls, that the executors were entitled to the surplus under their right as executors, appears to have been pronounced without any doubt whatsoever; proceeding to distinguish this case from *Robinson v. Taylor* upon the ground, (and as far as I can perceive upon this alone) that in that case the gift was to individuals, described by the title of executors, not by their names. The difficulty I have upon that is, that, unless the testator meant to give to them in their character of executors, it seems, very difficult to say, what distinction arises from his using the term "executors" as a description of the individual persons, and not of persons connected with the office as executors; and in that case of *Robinson v. Taylor*, as it is printed, the devise and bequest of his real and personal estate is to his executors hereinafter named upon trust, &c. Attending to that, it is very difficult to suppose, he meant to give them the real and personal estate as executors, and did not use that term as descriptive of the individuals, who were to be the devisees and legatees.

There is another circumstance, to which the attention of the Master of the Rolls does not appear to have been called; that in declaring the trusts of some part of the property he says, [* 257] "the Executors hereinafter named:" * so that I doubt,

whether that distinction, which has been so much relied upon, exists here.

My great difficulty in this case is not upon the effect of a devise and bequest of real and personal estate to trustees upon trusts, those trusts expressed not exhausting the whole interest; a case upon it is very difficult to maintain; that, as they are afterwards named executors, they are to have what is not exhausted of the property they take as trustees: but the difficulty I feel is, whether I am to construe the words "upon trust" to mean "charged and chargeable," or "charged and chargeable" to mean "in trust." As the Master of the Rolls however seems to have laid so much stress upon *Robinson v. Taylor*, I will see the Register's Book.

Aug. 23d. The Lord CHANCELLOR.—The question is, whether upon the whole Will this is to be taken as a devise and bequest to these executors, with reference to their office, upon a trust to pay; or as giving them the absolute property, subject only to a charge; and I think the latter was the intention.

The Decree therefore must be affirmed (1).

See, *ante*, the notes to S. C., 15 V. 409.

ANONYMOUS (2).

[* 258]

[ROLLS.—1811, AUGUST.]

IN the distribution of separate property of a married woman, as assets after her death, a bond not entitled to priority.

A MARRIED woman, having separate property, died indebted by a bond and simple contract. The assets proving deficient, the simple contract creditors insisted, that the specialty creditors were not entitled to any preference, and that the distribution should be *pari passu* among all the creditors.

Mr. *Martin* for the Plaintiffs: Mr. *Newland* for the Executors, Defendants.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT] held, that the circumstance of a debt, contracted by a married woman, being secured by a bond, did not give the creditor any priority: the bond, considered merely as a bond, being void: therefore all the debts must be paid equally.

A BOND given by a *feme covert* is, at law, merely void; to an action brought upon it, she may plead *non est factum*; it is a more inofficious instrument than a

(1) In *Southouse v. Bate*, 2 Ves. & Bea. 396, the Master of the Rolls declares, that he still thinks the Executors, as such, would have been entitled, even if it had been decided, that they did not take by the direct bequest.

(2) *Ex Relatione*.

bond given by an infant, which is only voidable. Still, though the law says a married woman may have a disposing mind, but cannot have a disposing power, or be allowed to bind herself; yet, when she has a separate trust estate, equity will support her disposing power over such estate, and make it answerable for her obligations. To prove the demands against her, her bond may be read in evidence; and, however devoid of legal operation such an instrument may be, even her parol declarations respecting the grounds on which it was given are, in equity, admissible to place it on the footing of a simple contract debt, at any rate: *Norton v. Turvill*, 2 P. Wms. 145; *Lockett v. Wray*, 4 Brown, 486; *Peacock v. Monk*, 2 Ves. Sen. 193; *Stratford v. Powell*, 1 Ball & Beat. 24. As to the general doctrine, with respect to the power which a *feme covert* has of charging, or of absolutely disposing of, property settled to her separate use, and the restrictions which may be imposed upon the exercise of any such power, see, *ante*, the notes to *Pybus v. Smith*, 1 V. 189.

MILNER v. LORD HAREWOOD.

[1810, DEC. 13. 1811, MARCH 13; JUNE 11.]

FEMALE infant not bound by agreement to settle her freehold estate on marriage without an option, when twenty-one, to refuse: but her heir bound under the circumstances; claiming as special occupant; the subject being leaseholds for lives, frequently during and since the coverture renewed by the husband; who had settled his own estate: the settlement confirmed by her repeated acts and Fines, though not of the life estates, and by orders of Court; children having existed, though deceased under age: no claim for many years; and during eighteen an adverse possession against a former heir by the husband: the Bill claiming, not against his assets, but merely an account since his death against his devisee for life; whose possession commenced long since the fall of the surviving life in the original leases.

Leases for lives distributable as personal estate, when there is no special occupant, or where the Executor is the special occupant, [p. 273.]

Act of Guardian without authority, if beneficial to the infant, protected, [p. 273.]

One lease for lives to the lessee and her heirs, and another to her and her executors: as to the effect in Equity of a declaration of trust for A. simply, *quare*: but, if the leases were merely renewals by a guardian, the trust must follow the actual interest of the infant; namely, in one estate to the heir, in the other to the executor, [p. 274.]

Interest of an infant not affected by the recital of a deed made during infancy, [p. 274.]

Though a female infant is not bound by an agreement on marriage to settle her real estate, if she does not, when of age, choose to accede to it, her husband would not be permitted to aid her in defeating it: nor is her act during coverture effectual (*a*), [p. 275.]

Partial accession at the age of twenty-one to a Settlement by a female infant an election to abide by the whole, [p. 277.]

By indentures, dated the 5th of January, 1746, reciting an intended marriage between Edwin Lascelles and Elizabeth Dawes, that she was seised, and possessed of, and entitled to, an estate in possession of the yearly value of 400*l.*, part freehold, part copyhold, and part held by leases for three lives, then in being, and entitled to

(*a*) In consequence of the capacity of infants, at the age of consent, to contract marriage, their marriage settlements, when reasonable, have been held valid in Chancery; but it has long been an unsettled question, whether a female infant could bind her real estate by marriage. 2 Kent, Com. (5th ed.) 243, 244. Mr.

large estates in reversion, and possessed of personal estate, and, that, as she was under the age of twenty-one, no legal settlement could be then made of the real estates, whereof she was seised, &c. in possession, and it had been agreed, that, as soon as she should attain twenty-one, and have power to settle the several lands, &c., they should be settled to the uses and trusts after mentioned, or, in case she should attain twenty-one, and then refuse to concur with Edwin Lascelles and the other parties in such intended settlement, that then and in such case she should not take any benefit from the agreements after expressed, and the provisions after mentioned by Henry and Edwin Lascelles for the younger children should in that case cease, Henry Lascelles covenanted with Beilby Thompson and Dame Sarah, his wife, and Edwin Lascelles, their respective heirs, executors, &c., that he Henry Lascelles, or his heirs, and Edwin Lascelles, if then living, should within three years after the marriage settle the inheritance in fee simple of the manors of Harwood and Gauthorpe, &c., in the county of York, subject, as to part, to a term of ninety-nine * years, if Edwin Lascelles should [* 260] so long live, and Elizabeth should die in his life, to raise maintenance for an eldest son, and to a term of five hundred years, to make up the rents of estates to which she was entitled in possession under her father's marriage settlement, or otherwise in her own right 1200*l.* per annum in bar of dower, and for providing portions for younger children, to the use of Edwin Lascelles for life, with remainders to the first and other sons in tail male, and to Edwin Lascelles and his heirs; and farther reciting, that Elizabeth Dawes was under twenty-one, and, till she attained that age, no legal settlement could be made of the estates, of which she was seised, &c., but it was agreed, that, in case she should attain twenty-one, Thompson and Dame Sarah, his wife, if both living, and the latter, if she survived, should join, if necessary, in conveying the freehold; copyhold, and leasehold estates, whereof Elizabeth Dawes was seised, &c., by the settlement on the marriage of her father or any other title, subject as to part to the jointure of Dame Sarah, and to other life estates, to the use of Edwin Lascelles for

Atherly, after reviewing the cases, concludes, that the weight of the conflicting authorities was in favor of her capacity so to bind herself. *Treatise on Marriage Settlement*, 28-41. The cases of *Strickland v. Croker*, 2 Bro. C. C. 545, and *Warburton v. Lytton*, are considered by him as favorable to the power of a male infant to settle his real estate upon marriage. But since the decision of Lord Eldon in the present case this conclusion becomes questionable; for if a female infant cannot settle her real estate without leaving with her the option, when 21, to revoke it, why should not the male infant have the same option. 2 Kent, Com. 244.

The question has been discussed at large in New York, whether an infant could bind herself by an ante-nuptial contract, and it was held that a legal jointure settled upon an infant before marriage was a bar of her dower: and that an equitable provision settled upon an infant in bar of dower, and to take effect immediately on the death of the husband, and to continue during the life of the widow, and being a reasonable and competent livelihood for the wife under the circumstances, was also a bar. *McCartee v. Teller*, 2 Paige, 511.

life; with remainders, subject to a term of 100 years for securing the rent-charge of 1200*l.*, to the first and other sons in tail male, to the daughters, as tenants in common in tail general, and to the survivor of Edwin Lascelles and Elizabeth Dawes and his or her heirs: and it was declared, if she should refuse to join in conveying all her interest in her estates, whether freehold, copyhold, or leasehold, that then and from thence all the estates and trusts, before limited for the benefit of her or any child or children of her body, who should not be heir male of Edwin Lascelles and her, should cease; and she, they or any of them should in such case take no benefit or advantage whatsoever by these presents; nor claim any dower, &c.

[*261] * Mrs. Lascelles, having attained the age of twenty-one, in 1750, joined in levying fines of her real estates of inheritance; and by a deed, dated the 25th of October, 1750, reciting, that Henry Lascelles had by indentures of the 22d and 23d of May last settled all his estates in the county of York, &c. in trust for the uses of the settlement of 1746, it was declared, that the fines should enure to the use of William Thompson and George Maxwell and their heirs, upon trust to settle to the uses and trusts, expressed concerning the real estates in possession and reversion of Elizabeth Lascelles by the settlement of 1746; and farther reciting, that she was entitled to the rectories of Chippen and Over by leases, dated in 1744, from the Bishop of Chester to her mother Sarah Thompson for three lives, and to premises in the City of York by lease, in 1744, from the Archbishop of York and the Dean and Chapter for three lives, to Beilby Thompson, as trustee for Elizabeth Lascelles, and that, the legal estate of the said leasehold premises not being in her, the proper fines and conveyances could not be levied and executed, it was declared, that proper fines and conveyances should be levied and executed to the same trusts as were before declared of the estates of Elizabeth Lascelles.

By indentures of lease and release, dated the 10th of November, 1750, reciting the settlement, and the indentures of May 1750, the fines levied, the title of Elizabeth Lascelles to the three leases, and that, the legal estate not being in her, the proper fines and conveyances could not be levied and executed, it was declared, that proper conveyances should be executed to vest the leases and premises in Thompson and Maxwell and their heirs upon the trusts declared respecting the fines levied of the freehold estates; and reciting, that, the heir of Beilby * Thompson being an infant, no conveyance of the premises in the lease, renewed by him in 1744, could be had, it was declared, that in pursuance of the settlement and the deed of October 1750 and by the request of Edwin Lascelles and his wife Sarah Thompson conveyed the premises in the said lease to Thompson and Maxwell and their heirs in trust to convey to the uses of the settlement of 1746.

By an Order, pronounced on the 28th of November, 1751, upon the petition of Mr. and Mrs. Lascelles, reciting the death of Beilby

Thompson, the trustee in the leases of 1744 for Mrs. Lascelles, an inquiry was directed, whether his son was an infant trustee within the Act (1); and upon the Master's Report, that he was, an Order was made on the 20th of July, 1754, on the petition of Mr. and Mrs. Lascelles, that the infant should convey the said leaseholds for lives to the uses of the settlement; which conveyance was made by indentures of the 20th and 21st of June 1755 to Maxwell and his heirs.

By indentures, dated the 24th and 25th of March, 1778, reciting, that no conveyance had been made in performance of the trusts of the deed of October 1750, and that the legal estate was vested in Edwin and Daniel Lascelles, as devisees of Maxwell, or in his heir Henry Maxwell, Daniel Lascelles and Henry Maxwell conveyed to Edwin Lascelles.

Fines were not levied of these estates; the rents of which Mr. Lascelles received during the joint lives of himself and his wife in right of her seisin. She died in 1764 without issue; two children of the marriage having *died in their infancy. [*263] Mr. Lascelles, afterwards created Lord Harewood, continued in possession; and, all the leases being surrendered, new leases were procured at his expense. He died in 1795: Lady Milner, the surviving life in all the leases, having died in 1782.

The Bill was filed in 1807 by the heir at law of Mrs. Lascelles; insisting, that, being an infant at the date of the settlement, she could not bind herself or her heirs: and though the indenture of the 25th of October, 1750, was executed after she had attained twenty-one, yet being then a *feme covert*, and not having levied fines, she was not bound; stating, that the Plaintiff was ignorant of his title until lately; praying therefore an account of the rents and profits of the premises, comprised in the leases for lives, since the death of the late Lord Harewood in 1795; and that the Defendant, claiming as his heir at law or devisee, may be declared a trustee for the Plaintiff; and may be decreed to deliver up the leases, &c.

The Defendant, tenant for life under the Will of the late Lord Harewood, by his answer stated the original leases made in 1722: one by Sir William Dawes, Archbishop of York, the grandfather of Mrs. Lascelles, and by the Dean and Chapter, to Elizabeth Pierrepont, her heirs and assigns, of lands in the county of York for lives of herself, Sir Darcey Dawes, only son of the Archbishop, and father of Mrs. Lascelles, and of Elizabeth Lady Milner, only daughter of the Archbishop, and of the survivor: another lease of the rectory of Chippen to Elizabeth Pierrepont, her executors and administrators; and another of the rectory of Over to Elizabeth Pierrepont, her heirs and assigns; both granted by the Bishop of Chester for the *same lives; and all the three leases in trust for the Arch- [*264] bishop of York.

The Answer farther stated the death of the Archbishop, and of

his son Sir Darcey Dawes in 1732, leaving Sarah Dawes his widow, afterwards wife of Beilby Thompson, and Sir William Dawes and Elizabeth Lascelles his only children; that Dame Sarah, as guardian of the infant son, in 1733, procured renewals of the three leases, and paid the fines; and again in 1744, after her marriage with Thompson. On the renewed leases of the Over and Chippen estates in 1733 was indorsed a declaration by the lessee, acknowledging herself a trustee for her son; and on the renewal in 1744, a similar declaration was indorsed as to the York estate.

By indentures dated the 14th and 15th of November, 1733, reciting the renewals, that such renewals were under an implied trust for Sir William Dawes and his heirs, but that the legal estate therein for the several lives, for which they were respectively granted, was then vested in the said Dame Sarah Dawes, she, in consideration of 350*l.* borrowed for the fines, &c., demised all the premises, held under the Archbishop, to Elizabeth Roundell and her heirs, &c. subject to redemption; who in 1739 reconveyed to Sarah Dawes. Farther renewals were obtained in 1758 and 1760, and in 1782 after the death of Mrs. Lascelles.

The Answer denied, that the late Lord Harewood was a trustee of the new leases for the Plaintiff; insisting, that by the effect of his marriage and the instruments executed he became entitled for his own benefit; that on his death the Defendant became entitled to all these leasehold estates, and had been ever since in possession; that the late Lord Harewood was under the settlement of 1746

[* 265] * entitled to the premises comprised in the leases; and

Elizabeth, his wife, after she came of age, acquiesced in that agreement, and joined in the several acts to give effect to the settlement; and therefore neither she, nor any person claiming under her, ought to object to such agreement, or the acts done in performance of it, or now set up any claim except under it; and that the Court ought to relieve the Defendant against any omission by mistake, and ought not to assist the Plaintiff; that the leases were renewed at the expense of the late Lord Harewood, and of the Defendant since his death, with uninterrupted possession by them; that Elizabeth Lascelles died forty-three years ago; and, until this Bill was filed, neither the late Lord nor the Defendant was called upon for any account of the rents; nor was any attempt made to effect them; and, in case the heirs or representatives of Elizabeth Lascelles had any right to call upon the late Lord Harewood, or the Defendant, they must be presumed to have abandoned it: the answer, insisting upon the benefit of the length of time, as if pleaded; and stating farther, that Elizabeth Milner, who was the heir of Elizabeth Lascelles at her death, knew her intention to give full effect to the settlement; that she never intended to dispute, but was willing to confirm, it; and by deed poll, dated the 3d of November, 1780, reciting, that at a Court held for the manor of Tollshunt Gyves, in Essex, it was found that Elizabeth Lascelles died seised to her and her heirs of copyhold lands, and that by an agreement in the settlement

in 1746 for surrendering, Edward Lascelles became entitled to him and his heirs, there being no issue, but no actual surrender having been made to the uses of the settlement, the legal estate of the said copyhold lands on the decease of Elizabeth Lascelles descended to Elizabeth Milner, as her heir, in trust for Edwin Lascelles and his heirs, and a grant on the 3d of May last to Edwin Lascelles and his heirs, upon * his claim under the settlement, [* 266] Elizabeth Milner for confirming and establishing his title released and confirmed to him and his heirs the said copyhold lands, &c.

The Answer farther stating, that in 1785 the Plaintiff, as heir, surrendered to Edwin Lord Harewood copyhold estates held of the manor of Braintree in Essex, which he claimed under the agreement in 1746, submitted, that the Plaintiff is now well satisfied of the validity of such title; insisting, therefore, that under all the circumstances, the Plaintiff is not entitled to relief.

Mr. *Richards*, Sir *Samuel Romilly*, and Mr. *Trower*, for the Plaintiff.—The Plaintiff claims as the heir at law of Mrs. Lascelles, and also as special occupant of the leasehold estates; no fine having been levied, nor any act done by Mrs. Lascelles in any way denoting her intention. As to certain freehold estates she by fine confirmed the settlement; but she never did any act preventing the descent of these lands to her heir, as special occupant. The defence, as it may be collected from the answer, is, that she was bound by the settlement of 1746; or if not, that she did some act, after she was of age, which reached these leaseholds as well as her general estate, and bound herself and her heirs.

The general principles are, that a female infant is not bound by a settlement, during her minority, as to her real estate: *Clough v. Clough* (1); and that a married woman cannot speak as to her real estate but under the protection of the law and through the medium of a fine; to which a necessary preliminary is the private examination by a * Judge. Mr. Lascelles cannot be represented as meaning to bind this property, of which she [* 267] has not levied fines: on the contrary, the fines levied of her other estates rather import, that these were not to be touched. It is true the expression of the deed imports an intention to levy a fine; but that for a technical reason it was not done. In that they were clearly mistaken; as it is impossible to maintain, that a fine cannot be levied of a trust interest in real estate. It is sufficient, that there was no fine: but the expression of such intention in the instrument executed, when she was under the coercion of her husband, has no more effect than if it occurred in any ordinary correspondence, or a parol declaration. That part of the deed cannot be read against her, or those claiming under her. Her actual intention, if it could be regarded, must be supposed to have changed; and, until some act was done, she had the opportunity of repenting. During the four-

(1) Wooddes. 453, note c.; ante, vol. v. 710; see the note, 717.

teen years, which elapsed between the execution of that deed and her death, no step was given to take effect to the settlement, and there is a probable cause for hesitation on the part of herself and her friends, that it was in a high degree disadvantageous to her; if that vague principle is to determine, whether an infant is bound or not. She probably, discovering her rights, thought she had conceded enough, and meant to reserve this.

The Order of Reference, obtained in 1751, cannot without some act by her to give effect to the settlement be considered as evidence of a right to have it considered as her deed; deciding upon the interests of persons not before the Court or competent to defend themselves. That Order was made upon the mere application of the husband and wife *ex parte*, and not opposed; no one before the Court to protect her interest, or that of the children, if there should be any. Without a ground for supposing that some act [* 268] had been done by her to give effect to the * settlement, that Order cannot amount even to evidence of the right of Mr. Lascelles to have the estate after his wife's death. It would be great injustice to Lord Hardwicke to represent that Order as his judgment upon a question, which Lord Thurlow afterwards in *Durnford v. Lane* (1) considered so doubtful; but upon that occasion the attention of all parties must have been called to the fact, that a fine had not been levied.

Another ground of defence is, that the heirs have acted so as to show, that they understood the articles of 1746 to be conclusive upon Mrs. Lascelles and her heirs, viz. in the surrenders of copyhold estates by Lady Milner in 1780, and by Sir William Milner in 1785, at the request of Lord Harewood. Those acts, which are represented as a clear indication of their assent to the articles of 1746, were done in ignorance of their right; which was asserted the instant it was known. Those surrenders, the necessity for which could arise only from the want of any act by Mrs. Lascelles, exclude all notion of any such act, and all presumption of releases; which is farther excluded by the result of the trial of an ejectment brought for some copyhold lands (2); in which against a defence upon the Statute of Limitations and the presumption of releases the heir obtained a verdict and judgment; and, a motion for a new trial being refused, Lord Harewood has acquiesced under that judgment.

The only substantial defence is the length of time, that elapsed without any claim. Length of time can only be insisted [* 269] on, as forming a bar to enforcing a right, * either expressly by the Statutes of Limitation or by analogy to them, or as affording a presumption of some fact having taken place. There is no period of limitation, beyond which such an equitable title cannot be insisted on. The Statutes of Limitation not applying to trusts, no positive rule can be insisted on. Some presumption,

(1) 1 Bro. C. C. 106. See Mr. Hargrave's note (228); Co. Lit. 37 a; *Clough v. Clough*, ante, vol. v. 710, and the note, 717.

(2) Doe, on the demise of *Milner v. Brightwen*, 10 East, 583.

therefore, must be raised ; but from what facts ? The answer says, not that any interest of the heir was parted with by conveyance, or any release was executed, but that the Court must presume, that he has abandoned and relinquished his right. In no instance has the gratuitous relinquishment of a legal right been presumed ; and for this purpose an equitable right is the same. The party, having that intention, is at liberty to change it at any period, until he actually releases ; and his laches cannot give any right to another. If the son permits for fifty-nine years an illegitimate son to retain possession, however difficult it may be to account for not insisting upon his title, it is impossible to presume, that he meant to give it up, if it can be presumed that he knew it. A release may be presumed from acts, but not an abandonment or relinquishment. The answer does not suggest a release ; and all the acts done and relied on by the Defendant, are inconsistent with that defence. Would not a release have extended to all the property bound by the same settlement ; that, for instance, surrendered in 1780 and 1785 ? Would that property have been excepted, when a release was required ? The omission at that time to insist on their right may be accounted for by their ignorance of it, perhaps by some vague notion, that all this property was bound ; and, considering themselves as having no right, they complied with Lord Harewood's call for those surrenders.

Mr. Hart, Mr. Cooke and Mr. Bell for the Defendant.—
The Plaintiff, admitting he has * not a legal title, desires [* 270] to divest the legal title, which has subsisted in the Defendant and his ancestors sixty-seven years : that legal title accompanied by a clear adverse possession forty-seven years, known by the Plaintiff and those, under whom he claims, to be adverse to those equitable rights which are now advanced. The Law of this Court is, that a female infant, with the consent of her guardians contracting for a settlement previous to her marriage, is capable of binding her property in Equity ; and, farther, would be compelled by this Court to give legal effect to her contract. That proposition, which has been frequently stated, *Cannel v. Buckle* (1), and *Harvey v. Ashley* (2), is established as the Law of this Court by one case (3), finally decided in the House of Lords, reversing Lord Northington's Decree : the judgment of the House of Lords going upon the general point, that the infant was bound by the contract, previous to her marriage, for a reasonable settlement : the final Decree expressly declaring, that she was bound by the agreement, and it ought to be carried into execution. That authority, followed by *Durnford v. Lane* (4), before Lord Thurlow, is decisive. This case, however, turns rather upon the peculiarity of this settlement than the dry question.

(1) 2 P. Will. 242.

(2) 3 Atk. 607.

(3) *Drury v. Drury*, 5 Bro. P. C. 570 ; 4 Bro. C. C. 505, note ; Co. Lit. 36 b ; Mr. Hargrave's note, 7. See the note, ante, vol. v. 717, *Clough v. Clough*.

(4) 1 Bro. C. C. 106.

Mr. *Richards*, in reply.—Whatever may be the case of a jointure, no inference can be drawn from *Drury v. Drury*, that a [* 271] female infant can settle her real * property upon her marriage any more than upon any other consideration; and no act was done by Mrs Lascelles during her coverture, that, supposing this had been an estate in fee-simple, could bind it; which could only be by fine or recovery, matter of record; without which no indication of intention on her part could have effect. She could not upon her marriage, as an adult proprietor might, reserve to herself any power over her estate, which her infancy disabled her from conveying.

This species of estate, though not a fee-simple, resembles an estate by descent; and admits in a considerable degree the same reasoning. The heir, taking as special occupant, is included in the ancestor, who may defeat that title; so the tenant, *quasi* intail, may bar the title of the heir of his body: but some act is necessary to displace the estate of the special occupant. There cannot be a transmission of the estate without a conveyance; though the remainder may be barred by a mere act, viz. a surrender; but Mrs. Lascelles had no legal estate to surrender; and she neither attempted, nor could do, any act to affect this property. Their intention, declared in 1750, to levy fines, was abandoned, and never resumed. Her husband must be considered as a mere trustee. There is no act by him showing an adverse possession; the mere omission to account for the rents is not conclusive evidence of that. The monuments of this estate, the deeds of 1746 and 1750, and all the renewals, were in his hands; and the parties, for whom he was a trustee, were ignorant of what was passing. With that want of knowledge, and his suppression of the information, which he had the means of communicating, his application of the rents to his own use can have no effect against those, for whom he was a trustee. The au- [* 272] thority most applicable is * *Atkinson v. Baker* (1); and certainly the heir can maintain no claim to those leases, of which the trust is for Mrs. Lascelles and her executors.

June 11th. The Lord CHANCELLOR [ELDON].—This case stands under very singular circumstances; and the decision, that ought to be made, is not governed by any precedent within my memory or research. The Bill was filed in 1807 by the heir at Law of Mrs. Lascelles, who died in 1764. On her death the Plaintiff's mother was her heir at law; who lived to the year 1782. I notice that circumstance, as the Bill states the Plaintiff to be the heir without taking as much notice as is necessary of the fact, that there was an intermediate heir living from 1764 to 1782. The prayer of the Bill also is confined to an account of the rents and profits of these leasehold estates since the death of the late Lord Harewood in 1795; seeking no relief to be obtained out of his assets; which I

also notice ; as, if the title of the heirs of Mrs Lascelles accrued in 1764, the Bill asks nothing as to the rents and profits between that year and 1795 ; the prayer constituting a personal demand only against the present Lord Harewood ; who by the answer appears to be the tenant for life only of all the estates, including these, that were devised by the late Lord Harewood ; and the prayer of the Bill, calling farther upon the Defendant to deliver up the leases, is, if that was material, open to an objection for want of parties ; as, the legal estate being in him by renewals, is *prima facie* a trust for him and the persons taking in remainder under the late Lord Harewood's Will ; and the persons interested in his estate ought to be before the Court. [* 273]

Under the demises in 1722 to Elizabeth Pierrepont by the Bishop of Chester, (as I collect from subsequent documents and transactions in trust for himself), she became the lessee for these lives with this only difference, that in case of her death her executors or administrators would take the rectory of Chippen as special occupants, and not her heir ; who would be the special occupant of the premises at Over, and those which I shall distinguish as the York estate, under the limitation to her heirs and assigns.

- The Statutes (1) which made leases for lives distributable as personal estate, if there is no special occupant, cannot apply to any of these leases, in which there is a special occupant named ; but I have determined (2), and I see no reason to dissent from it, that, where the executor is the special occupant, taking as executor he must hold that as all other property taken by an executor, and therefore distributable in this Court.

On the 4th of April, 1733, the legal estate being in Elizabeth Pierrepont, as a trustee for the infant son, then four years old, a new lease of the Over estate was made to Dame Sarah Dawes, the widow, her heirs and assigns, for lives. Upon whose surrender that new lease was made I cannot collect, nor by what authority, as it affects and binds the equitable interest of this infant ; the widow probably being the guardian ; in which case this Court would perhaps ultimately have protected her act for the benefit of the infant ; though, had the actual consequence been detrimental to him, that might have created some difficulty. A new lease was also made of the York estate to the same lessee, for the same lives, upon a surrender of the old lease ; and also a new lease of the Chippen

* estate to her, her executors and administrators. Upon [* 274] the lease of the Over estate, and also upon that of the Chippen estate, is indorsed a short declaration of trust, acknowledging herself a trustee for her son ; and a question of some nicety and difficulty was raised upon the effect in equity of such a declaration of trust : viz. the lease of the Over estate being taken to the lessee,

(1) Stat. 29 Car. II. c. 3, s. 12 ; Stat. 14 Geo. II. c. 20, s. 9.

(2) *Ripley v. Watworth*, ante, vol. vii. 425.

her heirs and assigns, and of the Chippen estate to her and her executors and administrators, and the declaration of trust being for the son simply, not expressing his heirs or executors, whether, if she had been called upon to convey, she might convey in the one case to him and his heirs, in the other to him and his executors; or, as, if the interest in the lease, had it been made to her without more, would go to her executors, so, the declaration of trust being for the son simply, it ought to go to his executors.

My opinion is, that, if the mother took these renewals as guardian, and if any estate vested in her by a proper surrender and grant, as she could not alter the infant's interest by any declaration of trust, which must be construed with reference to the two estates to give him the same interest he had previously, the construction must be as to the Over estate for him and his heirs, and as to the other for him and his executors. The York estate would fall under the same consideration as the Over estate: but there was no declaration of trust as to that until the demise of 1744: when a similar declaration was indorsed.

It was contended upon the recital in the mortgage deed of November, 1733, by Sarah Dawes, and the reconveyance in 1739, that, the legal estate being in her, there was an implied trust for her son, Sir

William: but that recital, being made during his infancy, [* 275] cannot, in my * opinion, change the nature of his interest.

The equitable interest would therefore stand, as I have before stated. In 1744, having married Thompson, she surrendered these leasehold premises to the persons representing the church; the effect of which must depend upon her situation at that time, as a married woman, having the legal estate; and she took a demise of the Over and Chippen estates, the first to her and her heirs, the other to her and her executors; and in November she surrendered the York estate; and a new lease was made to her husband for lives.

The difficulty, upon which the principle that pervades this Bill rests, is this: how could this surrender operate, as being the surrender of a married woman? If it did not vest the estate in the church, is the re-grant any thing? Next, if the equitable interest cannot be affected by the act of the trustee, but some act analogous to a fine is essential, how was that interest affected? If the transaction of 1744 did not destroy her interest, and create a new estate, the old estate, existing under the deed of 1733, continued down to 1782, when Lady Milner died; and might be made the subject of settlement in 1746.

Much discussion took place at the Bar upon the point, whether a female infant can be bound by her covenant upon marriage as to her landed property; a point, for which there is not much room here: this settlement meaning to tender her an election, when her infancy should cease. I do not therefore examine those cases; merely observing, that in *Durnford v. Lane* (1) Lord Thurlow, who was much

(1) 1 Bro. C. C. 106, see 115; and the note, *ante*, vol. v. 717.

in favor of Lord Northington's opinion against the decision in the House of Lords, thought a female infant could not be so bound ; and I concur in that ; but Lord Thurlow's opinion was farther, that, if she did not, when * of age, choose to accede to [* 276] that engagement, the conscience of her husband was bound not to aid her in defeating it ; and in equity, as he would not be permitted to do so, it is impossible to permit her act during coverture to be effectual.

In this point of view the nature of this property, an estate for lives, is material. Had the settlement, instead of tendering an option, aimed at binding her positively to all intents, she might, when of age, according to Lord Thurlow's doctrine, which is now the settled law, have said, she would not do any act : but the husband, being seised, *Jure Uxoris*, would have a right to say, that, if she would not settle according to the agreement, he would take the rents ; and she could not renew, or authorize the trustees to renew, without his consent ; that he would not give his consent ; and, if the estate expired during the coverture, she could not complain.

I lay no stress upon the observation, that this was a bad settlement for her. I am not satisfied that it was so. Her income was but 400*l.* per annum, though she had considerable estates in expectancy after lives, which, however, might endure long after the coverture had ceased ; and she would not be entitled to the rents of those estates vested in other persons. She gets therefore 800*l.* per annum, before those reversionary estates fall into possession : she secured portions for the younger children, and a maintenance for the elder son out of the estate of Mr. Lascelles in case of his death before her : and I add, that this was a settlement not binding her at all events ; but that, attaining the age of twenty-one, she was then to make her election to be bound, or not. A younger child, and there were two, would become entitled to the portion ; but not unless she acceded to all the terms of the settlement ; and even a partial accession would be * considered an election to abide by the settle- [* 277] ment, manifested so that this Court would not permit her to withdraw, and insist upon an apportionment of the portion and maintenance ; but would hold her bound to make good the agreement for herself and others beneficially entitled under it.

Nothing having been done on the part of Mr. Lascelles between 1746 and May 1750, about which time she came of age, he then with her concurrence conveyed all his estate, bound by the covenant, to the uses of the settlement. Here I notice, that, though she had afterwards refused, this agreement would, as far as the children were concerned, have been executed in equity ; and the settlement has this farther distinction, that Mr. Lascelles was bound by express provision either in case she accepted, or refused to accept it.

Mr. Lascelles having in 1750 conveyed all his estate to the uses of the settlement, in October 1750, she being then of age, levied fines of her freehold estates in possession and reversion for the purposes of the settlement of 1746. This deed recites her agreement

to that settlement, and the leases to Mrs. Thompson and her husband, who are not parties to that deed of 1750; and that, Mr. and Mrs. Lascelles not having the legal estate, it was therefore agreed, that fines should be levied, or such other conveyances made, as should be deemed necessary; and she executed this deed, certainly not her deed in law, as being a married woman: but the real question is, whether a married woman under these circumstances, can elect in equity.

In November 1750 Mrs. Thompson assigned the Over and Chippen estates, Mr. and Mrs. Lascelles being parties; again reciting her agreement to take the benefit of the settlement, with [* 278] * a declaration similar to that in the preceding month of October, when she actually conveyed by fine all her freehold estates in possession and reversion to the uses of the settlement. One subject of consideration is, whether, if a suit had been then instituted by her, as a married woman, she could have compelled him to convey according to the settlement.

In November 1754 they presented a petition, stating the settlement, and her agreement and declaration; and praying, that the infant Thompson should be ordered to convey as an infant trustee. The Master's Report in July repeats her agreement to the settlement; and in 1775, the year preceding that, in which, before Lord Hardwicke resigned the Great Seal, the Act passed, declaring what the law is in ordinary circumstances as to surrenders of these leasehold interests, this Court, upon a view of the circumstances and the state of the title, ordered the infant to convey, not to another person as a mere trustee for those, who might happen to be beneficially interested in the property under the declaration of the Decree, but to the uses of the settlement of 1746.

It is impossible to suppose, that this Court in 1755, directing a conveyance to the uses of that settlement, overlooked the circumstance, that she was then a married woman: but it was considered, that under all the circumstances she was entitled to make out a complete title to that, in which she had by the previous conveyances an inchoate and imperfect title.

On the 9th of December, 1758, Maxwell, to whom the York estate was surrendered, took a new lease for lives to him, his heirs and assigns; and on the 23d of February, 1760, a demise was made of the Over and Chippen estates, keeping up the distinction between the heirs in the one case, [* 279] * and the executors in the other, as occupants. Considerable sums were paid on those renewals; and these leases having been thus assigned by the trustees taking new leases, declaring her agreement to the uses of the settlement, she died in 1764; and the bill was not filed until 1807; praying nothing with regard to the rents between 1764 and 1795, but merely only an account from the death of the late Lord Harewood in 1795; who made the present Defendant tenant for life only of his real estate.

During the period of coverture children came into existence, who

were entitled in consideration of her declarations and acts according to the settlement to call upon him to convey his estate; and that right, which those children had at any period during the coverture, cannot be affected by their decease. The non-claim for eighteen years, as against Lady Milner, the immediate heir of Mrs. Lascelles, continued to run against the person, who succeeded her. The ground of this title is an equity raised upon renewals: but Mr. Lascelles having accepted the conveyance of 1750 of her freehold estates, and she by that conveyance having paid part of the consideration for the interest her children were to have in the property, if the principle is, on the one hand, that a female infant cannot be bound by a settlement made in her infancy, and that her husband, on the other, cannot do any act to prevent her confirming it, any renewal by him must have been for the benefit of those entitled under the settlement, for whose benefit he had contracted, and whose interest this Court would not have permitted him to assist her in defeating.

That however might be laid out of consideration; for how is this to be taken otherwise than as an adverse possession against Lady Milner? She must be supposed to have been aware, that her niece was upon her marriage an infant, and could not *be bound by her marriage settlement. It was upon her [* 280] to inquire, what that settlement was. She suffers this property to be held eighteen years by a person, who cannot be represented as a trustee but upon an equity, which it is extremely difficult to apply; a person also acting eighteen years in defiance of that equity: her act upon the face of it stating the marriage, the agreement, the fact, that there was issue, the failure of that issue, and that she had become trustee of the legal estate.

The result of my opinion upon the circumstances of this case is this. Lady Milner, the survivor of the three lives at the marriage, having died in 1782, I do not see, how the heir of Mrs. Lascelles can claim beyond the year 1782, which period the late Mr. Lascelles survived; and there is no demand in the bill against his assets. Taking an infant female not to be bound as to her real estate by articles of agreement made in her infancy, yet, as this was a freehold for lives, the husband would at all events be entitled to the rents during the coverture; and the wife and her heirs could only insist on having the benefit of the estate, while the interest in the estate endured, which she had at the time of the marriage, and which had expired long before the present Defendant took possession. Her husband was not bound to renew for her benefit; and no other person could renew for her benefit, so as to bring a charge on her rents and profits during the coverture. It is very questionable, if he did renew, whether the renewal should be for her benefit. It might be fairly contended, that his renewal should be in equity for the benefit of all persons claiming under the settlement; which interests he ought not to aid his wife in defeating. If she and her heirs have all they could have had, if there had been no

renewals, they have all they could equitably claim ; and, though the late Lord Harewood received rents, which upon this principle, if it applied under * the circumstances of the case, may be said to belong to her heirs, yet the present Defendant received no rents until long after the death of the surviving *cestui que vie* in the lease existing at the time of the marriage ; and there is no demand in the bill against the assets of the late Lord.

The Bill was dismissed.

SEE, *ante*, the notes to S. C., 17 V. 144.

HARDING v. GLOVER (1).

[1810, JUNE 10.]

RECEIVER not ordered merely on a dissolution of partnership. Ordered on breach of the duty of a partner, or of the contract, as by continuing trade with joint effects on the separate account (a).

A MOTION was made for a Receiver after a dissolution in partnership.

The Lord CHANCELLOR [ELDON].—I have frequently disavowed, as a principle of this Court, that a Receiver is to be appointed merely on the ground of a dissolution of partnership. There must be some breach of the duty of a partner or of the contract of partnership. In this instance the Defendants have been carrying on trade on their own account with the partnership effects ; and it cannot be suggested, that the persons, who were debtors to the house, [* 282] have not for * these three years paid any money to the remaining partners, with whom they continued to deal.

The Order for a Receiver was made (2).

SEE the notes to *Hartz v. Schrader*, 8 V. 317.

(1) *Ex Relazione*.

(a) See, *ante*, note (a) *Peacock v. Peacock*, 16 V. 49.

(2) *Ante*, *Peacock v. Peacock*, vol. xvi. 49; 1 Swanst. 507, *Crawshay v. Maule*.

PEMBERTON, *Ex parte* (1).

[1810, August 13.]

DEEDS deposited with a Solicitor for a particular purpose, and, after that had failed, permitted to remain with him, subject to the general lien (a).

DEEDS had been delivered to a solicitor for the purpose of raising money. That object having failed, they were permitted to remain in his hands; and he claimed a lien upon them for his bill.

Mr. *Wear*, in support of the claim, of lien.

Mr. *Bell* opposed it; contending, that deeds, deposited for a particular purpose, were not subject to the general lien.

The Lord CHANCELLOR [ELDON] allowed the lien; considering the effect of permitting them to remain equivalent to a general deposit (2).

WITH respect to the *lien* of a solicitor upon papers which have come into his hands, and the qualifications of that doctrine, see, *ante*, the notes to *Taylor v. Popham*, 13 V. 56.

DUCKWORTH v. TRAFFORD (3). [* 283]

[1810, August 14.]

RECEIVER on affidavits before Answer.

A MOTION for a Receiver upon affidavits before answer was opposed upon the ground that it is irregular to apply for a Receiver before answer; and affidavits cannot be received.

The Lord CHANCELLOR [ELDON] said, the old rule not to grant a Receiver before answer was first broken through by Lord Kenyon (4); and the Order then made for a Receiver before answer had been followed since, when justice required it, and the merits appeared by affidavit.

SEE note 3 to *Jervis v. White*, 6 V. 738.

(1) *Ex Relatione*.

(a) See, *ante*, note (a) *Cowell v. Simpson*, 16 V. 275; W. W. Story, *Contracts*, § 330.

(2) *Ante*, *Ex parte Sterling*, vol. xvi. 258, and the note, 259.

(3) *Ex Relatione*.

(4) *Vann v. Barnett*, 2 Bro. C. C. 158. See *Jervis v. White*, *ante*, vol. vi. 738, and the note, 739.

JONES, *Ex parte* (1).

[1810, Nov. 12.]

ORDER for Joint Creditors to vote in the choice of Assignees under a separate Commission of Bankruptcy, the Petitioning Creditor, a Joint Creditor, consenting; and the only separate debt being under 10*l*.

THIS Petition prayed an Order for the proof of joint debts under a separate commission of bankruptcy, issued upon a joint debt, that distinct accounts may be kept, and that the joint creditors may be permitted to vote in the choice of assignees. There was only one separate creditor; whose debt did not exceed 4*l*.

The Lord CHANCELLOR [ELDON] said he believed, there was no instance of permitting joint creditors to vote in the choice [* 284] of assignees under a separate commission; but * afterwards upon the consent of the petitioning creditor made the order; observing, that, if the separate debts are not of the amount sufficient for voting in the choice of assignees, it is the same as if there were none (2).

1. THIS seems to be the same case as that reported in 1 Rose, 32, under the title of *Ex parte Laycock*.

2. By virtue of the 62d section of the statute of 6 Geo. IV., c. 16, joint creditors may now, in every case, prove under a separate commission against one member of a firm which is jointly indebted to them; but this proof will only enable him to vote in the choice of assignees, and to assent to or dissent from the certificate, and not (unless he was the petitioning creditor) to receive any dividend out of the separate estate until all the separate creditors are fully paid.

TAYLOR, *Ex parte* (3).

[1811, JULY 25.]

ORDER for Joint Creditors to vote in the choice of Assignees under a separate Commission of Bankruptcy, the Petitioning Creditor, a Joint Creditor, whose debt overbalanced the separate debts, consenting.

THIS Petition prayed, that joint creditors may be permitted to vote in the choice of assignees under a separate commission of bankruptcy, issued upon a joint debt for 1000*l*. The separate debts were inconsiderable; being greatly over-balanced by the single debt of the petitioning creditor; who consented to the application.

The Lord CHANCELLOR [ELDON] with some difficulty made the

(1) *Ex Relatione*.

(2) See the next case, and *Ex parte De Tastet*, ante, vol. xvii. 247; *Ex parte Machell*, 2 Ves. & Bea. 216; and the note, vol. iii. 243, *Ex parte Elton*.

(3) *Ex Relatione*.

Order; directing it to recite, that it appeared from the state of the proofs, that the petitioning creditor's debt over-balanced the separate debts (1).

See note 2 to the last preceding case.

CRUMP v. BAKER (2).

[* 285]

[1810, Dec. 21.]

CHARGES of a sale to be taxed under the head of Just Allowances, not of Costs

MR. WINGFIELD moved for an Order, that the Master might tax the expenses of a sale under the head of Costs.

The Lord CHANCELLOR [ELDON], thinking the charges proper, suggested, that an application should be made to the Master to inquire, whether he would pass them under the head of just allowances; under which charges of this kind would more properly fall (3).

No prudent person would undertake the duty of a trustee, a *prochein amy*, or a relator to an information in behalf of a charity, in all which cases the proper execution of his duty might make it necessary for him to incur expenses which could not strictly come under the head of costs, if the court, when satisfied of the correctness of those charges, could not order them to be reimbursed under the head of just allowances: *Fearn v. Young*, 10 Ves. 184; *Osborne v. Denne*, 7 Ves. 425.

STONARD, *Ex parte* (4).

[ROLLS.—1810, Dec. 24.]

RESIDUE of a Lunatic's property beyond his debts invested in a Government Annuity for his maintenance upon the Master's Report, that it was for his benefit.

AN Inquiry having been directed into the state of the funds of a lunatic, and whether it would be for his benefit to invest his property in an annuity for his maintenance, the Master's Report stated, that after his debts were discharged, there would remain 800*l.*; and it would be for his benefit to lay out that residue in a Government annuity for the life of the lunatic, to be applied to his maintenance.

(1) See the preceding case, and the note, *ante*, vol. iii. 243, *Ex parte Ellon*.

(2) *Ex Relatione*.

(3) *Fearn v. Young*, *ante*, vol. x. 184; *Stewart v. Hoare*, 2 Bro. C. C. 663; Beames on Costs, 135.

(4) *Ex Relatione*.

The Lord CHANCELLOR [ELDON] upon the petition of the Committee confirmed the Report; and made the Order for purchasing the annuity.

SEE note 1 to *Ex parte Chumley*, 1 V. 296.

[* 286]

BARBER v. BARBER (1).

[ROLLS.—1811.]

STATUTE of Limitations a bar to Merchants' Accounts, all accounts having ceased above six years (a).

THE Bill prayed an account against the representative of a surviving partner; alleging the partnership to have commenced in 1788, and to have continued to 1798 without any account settled. The partner died in 1806; and the Bill was filed in 1808.

The answer denied the partnership; and insisted on the Statute of Limitations.

Sir Samuel Romilly and Mr. Wingfield, for the Defendant, objected to the reading evidence as to the partnership: insisting, that, where all dealings had ceased above six years, the Statute is a bar to merchants' accounts: *Bridges v. Mitchell* (2), *Welford v. Liddel* (3).

Mr. Richards and Mr. Cooke, for the Plaintiff, contended, that merchants' accounts are excepted by the express words of the Statute (4).

THE MASTER OF THE ROLLS [GRANT] determined, that the case was within the Statute; all accounts having ceased six years.

SEE note 1 to *Jones v. Pengree*, 6 V. 580.

(1) *Ex Relatione*.

(a) The great weight of authority constrains the application of the exception in favor of merchants' accounts to accounts running within the space of six years. See, *ante*, note (c) *Jones v. Pengree*, 6 V. 580.

(2) Gilb. Eq. Rep. 224.

(3) 2 Ves. 400. See, *ante*, the argument in *Duff v. The East India Company*, vol. xv. 198, and the note, vi. 582; *post*, xix. 185.

(4) Stat. 21 Jam. I. c. 16, s. 3.

BONUS v. FLACK (1).

[1811, MARCH 4.]

DEFENDANT, in custody for want of his Examination, discharged immediately on putting it in: but if on reference it proves insufficient, the Plaintiff, not having accepted the Costs, may proceed from the last process.
Examination not to be signed by Counsel.

MR. AGAR moved that the Defendant should be discharged from custody, having put in his examination.

Mr. *Phillimore*, for the Plaintiff, objected, that the examination was not signed by Counsel; and that it was insufficient.

The Lord CHANCELLOR [ELDON] said, there is no Order of Court, requiring an examination to be signed by Counsel (2).

Upon the other objection the Defendant must be discharged; and if upon a reference the examination proves insufficient, the Plaintiff, not having accepted the costs (3), may proceed from the last process (4): but he cannot keep the Defendant in custody, until the sufficiency of the examination shall be ascertained.

1. THERE is no express order that every examination and answer to interrogatories, exhibited in the Master's office, should have the signature of counsel: *Yates v. Hardy*, Jacob's Rep. 224: yet, it rather seems, from the case of *Keene v. Price*, 1 Sim. & Stu. 99, that examinations, put in by parties to a cause, should be signed by counsel; but that the rule does not extend to other persons, not parties, incidentally brought before the court, who may exhibit their examinations without such signature.

2. A party who, after being in custody for a contempt, in not putting in an answer or examination, does put in an answer or examination, is not to be deprived of his personal liberty till it is ascertained whether his answer is sufficient: see, *ante*, the note to *Waters v. Taylor*, 16 V. 417. The defendant, however, in order to clear his contempt, should not only tender the costs, but, if they are refused, must also obtain an order, which is granted of course, for discharging his contempt: *Green v. Thompson*, 1 Sim. & Stu. 121. If the Master should subsequently report the defendant's answer to be insufficient, the plaintiff, whether he has or has not accepted costs (see the note to *Bailey v. Bailey*, 11 V. 151), may, generally speaking, go on with the old process: *Coulson v. Graham*, 1 Ves. & Bea. 331: but there may be specialties in a case which will entitle the defendant to be served with a *subpoena* for a better answer, and make it necessary for the plaintiff to commence the process of contempt *de novo*. This would be the case if the Master had allowed some of the exceptions to the defendant's answer, but had disallowed others, and the plaintiff had excepted to the Master's report, as to the exceptions overruled; for the defendant could not safely set about drawing the answer before the plaintiff's exceptions were disposed of: *Agar v. The Regent's Canal Company*, Coop. 221.

(1) *Ex Relatione*.

(2) *Keene v. Price*, 1 Sim. & Stu. 98. Exceptions must be signed by Counsel: *Yates v. Hardy*, 1 Jac. 223.

(3) *Hubbard v. Hewlett*, 2 Mad. 469.

(4) *Boehm v. Detastet*, 1 Ves. & Bea. 324.

ARNOLD v. PRESTON (1).

[1811, MARCH 25.]

TESTATOR gave legacies, with maintenance to his two illegitimate children, naming them, by C. B. and to all the other children he might have by her 6000*l.* each, and after other bequests the residue among his said children. By codicil he directed maintenance of another child born since; also interlining his name with those of the other children in the first part of the Will only. That child entitled only to maintenance and a share of the residue, not to the legacy of 6000*l.*

Natural child cannot take by a prospective bequest, made before his birth (a).

THE testator by his Will directed his two illegitimate children by C. B., naming them, to be maintained out of his estate; and gave them certain legacies; and gave to all the other children he might have by C. B. 6000*l.* each: and after several other bequests gave all the residue among his said children.

The testator had afterwards another child, the Plaintiff, by C. B.; and by a Codicil, made after the birth of that child, directed his executors to pay to C. B. 100*l.* a-year, and to maintain the Plaintiff until the age of fifteen, to be clothed and educated out of his estate: and in the first part of the Will, where the two eldest children are named, and their maintenance directed, the testator interlined the Plaintiff's name, but not at the bequest of the legacies of 6000*l.*, nor in any other part of the Will.

THE MASTER OF THE ROLLS [SIR WILLIAM GRANT] held, that the Plaintiff was not entitled under the bequest of 6000*l.*; but could take only a share of the residue and maintenance: had there been no interlineation, the Plaintiff, though brought up by the testator, and educated as his natural child, would not have been entitled under the prospective bequest (2); and the interlineation was no more than an acknowledgment of him as his child; but did not enable him to take the prospective legacy of 6000*l.*

SEE the note to *Earle v. Wilson*, 17 V. 528, with the farther references there given.

(1) *Ex Relatione*.

(a) A devise by the father to an unborn illegitimate child, in which the mother was described, has been held valid. *Pratt v. Flamen*, 5 Harr. & Johns. 10. See also *Beachcroft v. Beachcroft*, 1 Madd. 234, Phil. ed.; *Gardner v. Heyer*, 2 Paige, 11; 2 Kent, Com. (5th ed.) 217.

(2) See *Wilkinson v. Adam*, 1 Ves. & Bea. 422; *Cartwright v. Vaudry*, ante, vol. v. 530, and the note, 534.

M'GENNIS, *Ex parte* (1).

[1811, MARCH 8.]

BANKRUPT under Commitment may petition to supersede the Commission.

THIS Petition was presented by a bankrupt, under commitment by the Commissioners for not answering to their satisfaction ; praying that the Commission may be superseded upon objections to the proof of trading.

Mr. *Hart*, for the assignees, contended, that the petitioner, while in contempt, could not be heard.

The LORD CHANCELLOR [ELDON] said, he had a right to petition for the purpose of superseding the Commission, though under commitment for not answering ; and directed an issue (2).

1. THIS case is likewise reported in 1 Rose, 60 and 84.

2. As to the propriety of superseding a commission on the petition of a bankrupt who is under commitment, for not answering to the satisfaction of the commissioners, see note 3 to *Ex parte Bean*, 17 V. 47.

ROBINSON *v.* GRANT (3).

[1811, MAY 30.]

MARRIAGE by banns legal, though only one of the parties resided in the parish.

UPON an application to discharge from a commitment for having married a Ward of Court a question was made as to the legality of the marriage ; the banns not having been published in the parish of Kensington, where the wife resided.

It was contended, that, if neither of the parties had *re- [* 290] sided in the parish, where the publication of banns took place, yet the marriage would be legal by the effect of the clause in the Marriage Act (4), declaring, that after solemnization of any marriage under a publication of banns it shall not be necessary in support of such marriage to give any proof of the actual dwelling of the parties in the respective parishes, &c. wherein the banns were published : nor shall any evidence be received to the contrary in any suit touching the validity of such marriage.

(1) *Ex Relatone*, 1 Rose's Bank. Cases, 60, 84.

(2) *Ex parte Brown*, 2 Swanst. 290. These cases over-rule *Ex parte Bean*, ante, vol. xvii. 47.

(3) *Ex Relatone*.

(4) Stat. 26 Geo. II. c. 33, s. 8.

The Lord CHANCELLOR [ELDON], considering the marriage valid, ordered the petitioner to be discharged on his undertaking to lay proposals for a settlement before the Master.

SEE the 2nd section of the late Marriage Act, 4 Geo. IV. c. 76, and the amendments of that act, by the statutes of 5 Geo. IV., c. 32, and 6 Geo. IV., c. 92.

DOWNES, *Ex parte* (1).

[1811, JUNE 13.]

MORTGAGEE having given up his mortgage, and proved under a Commission of Bankruptcy against the mortgagor, not allowed to retract.

A MORTGAGEE, on a low valuation of the estate electing to give up his mortgage, was admitted to prove under a Commission of Bankruptcy against the mortgagor. The estate being afterwards sold by the assignees for a much larger sum, the mortgagee presented a petition, praying to be at liberty to withdraw his proof, and have the benefit of the mortgage.

[* 291] * The Lord CHANCELLOR [ELDON] said, it was dangerous to allow a mortgagee to retract his election after having had the benefit of his proof; and dismissed the petition.

1. THIS case is likewise reported in 1 Rose, 96.

2. A mortgagee of a bankrupt's estate who has consented to come in as a creditor under the commission, cannot retract his election; but, when he has merely given up the mortgage deeds on receiving the proceeds of a sale of the mortgage estate, should that sale not be completed, his *lien* will revive: see, *ante*, note 5 to *Ex parte Coming*, 9 V. 115.

OMMANEY v. BEVAN (2).

[ROLLS.—1811, JULY 5.]

RESIDUARY bequest in trust for the use and benefit of A. and in case of her death to be equally divided between the children of B. Payment decreed to the executor of A. as having taken the absolute interest.

RICHARD WHITEHALL by his Will, dated the 30th of September, 1780, made the following residuary disposition:

"All the rest, residue, and remainder of all my real and personal estate whatsoever and wheresoever, I give, devise, and bequeath,

(1) *Ex Relatione*.

(2) *Ex Relatione*.

unto my aforesaid trustees for the use and benefit of Mrs. Ann Popplewell, and in case of her death to be equally divided between the children of my half-brother William Whitehall."

Mrs. Popplewell survived the testator. After her death opposite claims being set up by her executor and by the children of William Whitehall under the residuary clause, the bill was filed by the executor of Richard Whitehall.

The cases cited were *Billings v. Sandom* (1), *Lord Douglas v. Chalmer* (2), and *Hinckley v. Simmons* (3).

*The MASTER OF THE ROLLS [Sir WILLIAM GRANT] [*292] decreed payment to the executor of Mrs. Popplewell, as having taken the absolute interest.

A REQUEST made in terms which, according to ordinary construction, are sufficiently large to pass an absolute interest, are never to be cut down into a gift for life only, except in cases where this qualification is necessary to make the whole will consistent: see, *ante*, the note to *Lord Douglas v. Chalmer*, 2 V. 501; see, also, note 2 to *Stanley v. Stanley*, 16 V. 491.

— v. BOLTON (4).

[ROLLS.—1811, JULY 5.]

INTERPLEADER on an Attorney's claim of lien upon a sum awarded as damages under a Judgment obtained by the Client against the Plaintiff.

THE Plaintiff having been sued by the Defendant Bolton at Law to judgment, the cause was referred to arbitration, to ascertain the damages. After the award the attorney of Bolton, claiming for the costs of the action and other business, gave the Plaintiff notice not to pay; who filed a bill of interpleader.

It was objected, that this was not a case of interpleader; and the attorney, if he had a lien, should have applied to the Court, in which the action was brought.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT] said, though the Court of Law, exercising summary jurisdiction, might assume the power of giving equitable relief, that would not oust the jurisdiction of this Court; and referred it to the Master to ascertain what was due to the attorney.

SEE note 5 to *Taylor v. Popham*, 13 V. 59.

(1) 1 Bro. C. C. 393. See the note (g), 3d edit.

(2) *Ante*, vol. ii. 501; see the note, 507.

(3) *Ante*, vol. iv. 160; *Cambridge v. Rous*, *Webster v. Hale*, viii. 12, 410.

(4) *Ex Relatione*.

WRIGHT v. MITCHELL.(1).

[1811, JULY 11, 15.]

ORDER, after the Bill dismissed, for payment of money out of Court.

THE bill was filed on behalf of the Plaintiff and all other creditors of an intestate for an account, and to set aside the assignment of a lease by the intestate to two of the Defendants in trust for a third. The tenants of the premises, being also made parties, paid the rent into Court. The bill having been dismissed for want of prosecution, a Motion was afterwards made by the assignees of the lease, that the money in Court should be paid out to them.

The Order was made: but the Register declining to draw it up, on the ground that, the Bill having been dismissed, the Court had no jurisdiction, the Motion was repeated.

The Lord CHANCELLOR [ELDON] said, the Court had jurisdiction to make an Order for payment of the money out of Court, and directed the Order to be drawn up (2).

UPON principles analogous to those held in this case, the jurisdiction in bankruptcy and in lunacy is held to have continuance, for certain purposes, notwithstanding the commission of bankruptcy may have been superseded, or the lunatic may have died: see, *ante*, note 1 to *Ex parte Linthwaite*, 16 V. 235, and note 6 to *Ex parte Bromfield*, 1 V. 453.

[* 294]

COHEN, *Ex parte* (3).

[1811, AUGUST 23.]

ORDER on application of a Bankrupt, committed, to bring him again before the Commissioners; if no effects, the Fees to be paid out of future effects, if any. If recommitted, he would find it difficult to obtain another Order.

A BANKRUPT, under commitment for not answering to the satisfaction of the Commissioners, applied to be brought before them again: but the assignees refusing, unless he would pay the expenses of the meeting, he applied to the Lord Chancellor.

Mr. Cullen, in support of the Petition.

The Lord CHANCELLOR directed, that, if there were no effects, the Commissioners should meet gratis; receiving their fees out of future effects, if there should be any: adding, that, if he should be again committed for not answering fully, he would find it very difficult to obtain another Order to bring him up.

SEE the notes to *Taylor's case*, 8 V. 328.

(1) *Ex Relatione*.

(2) 4 Vin. 430, pl. 11. So in the case of Abatement, the right being clear: *Roundell v. Curren*, *ante*, vol. vi. 250; Beames on Costs, 206, and the note, 10.

(3) *Ex Relatione*.

GEORGES v. GEORGES.

[1811, Oct. 30.]

WHETHER an Attorney's Lien upon papers extends to the original Will of his Client, *quære*.

Ordered to produce it before the Examiner, and for the hearing of the cause without prejudice.

Executor's right to retain his own debt, [p. 296.]

A SOLICITOR, attending the Master under a *Subpœna duces tecum* with an original Will, refused to produce or deliver it to any person before payment of his bill, amounting to above 1000*l.* for business done and money paid for the testatrix.

* A Motion was made for an Order upon him to produce [* 295] it.

Sir *Samuel Romilly* and Mr. *Hart*, in support of the Motion.—The lien of an attorney has never been extended to the original Will, executed by the client: the reason not applying to an instrument of that nature, involving many different interests: especially where, as in this instance, the solicitor is an attesting witness; by that act undertaking to produce and publish it immediately upon the death of the testatrix, that it may be deposited in the public register, where it may be open to general inspection. The lien must prevail equally with reference to real and personal estate: but as to the latter there is no doubt, that he would be compelled to produce the Will by citation in the Ecclesiastical Court. He cannot retain it even for the expense of preparing the instrument itself.

Mr. *Cooke*, for the Solicitor.—There is certainly no authority applicable to such an instrument: but authorities ought to be produced against the general lien of an attorney upon all papers in his hands for any sum due to him from the owner of those papers. What is there to except such an instrument: an appointment by Will or an instrument in nature of a Will, executed under a power by this lady in the interval between her first and second marriages, and prepared and attested by her solicitor? The observation, that he is a subscribing witness, and as to the interests of other persons, would apply to any papers in the hands of an attorney.

* The Lord CHANCELLOR.—Who is to satisfy the lien? [* 296]

Mr. *Cooke*, for the Solicitor.—Those, who want the production of the instrument. That constitutes the benefit of lien.

The Lord CHANCELLOR [ELDON].—Until something is done upon the Will, no one has authority even to bury (1); nor is it known whether it relates to real or personal estate. Such a claim is quite new. I never heard of a lien upon a Will. The effect of it would

(1) A stranger by that necessary Act does not become executor *de son tort*. *Stokes v. Porter*, Dy. 106, b. But a case is referred to of a widow adjudged so for milking the cows.

go to a great extent. The executor having a right to retain his own debt (1), consider the use, to which such a lien might be perverted by an attorney with a large debt, himself preparing the Will, and a subscribing witness, under this doctrine of lien keeping that Will, and setting himself above the executor. He cannot refuse the production for the purpose of establishing the character of all persons, claiming under the instrument.

Let him produce the Will before the Examiner and for the hearing of this cause: but I make that Order without prejudice to any application he may be advised to make (2).

SEE the concluding passage of note 2 to *Taylor v. Popham*, 13 V. 59.

[* 297]

MANN v. KING.

[1811, Nov. 2.]

COSTS not given on a Motion, unless mentioned in the notice.

Demurrer and Answer after a peremptory Order for three weeks' farther time to answer, following an Order for a month to plead, answer, or demur, not demurring alone, ordered to be taken off the File.

THE Defendant having had an Order for a month's time to plead, answer or demur, not demurring alone, and a subsequent peremptory Order for three weeks' farther time to answer, filed a Demurrer and Answer.

The Plaintiff moved, that the Demurrer and Answer should be taken off the file.

Mr. *Hart* and Mr. *Wilson*, for the Plaintiff, cited *Taylor v. Milner* (3).

The Lord CHANCELLOR made the Order.

Sir *Samuel Romilly*, and Mr. *Parker*, for the Defendant, resisted an application for costs, as not mentioned in the notice of Motion.

For the Plaintiff it is said, costs were frequently giving notwithstanding that omission.

The Lord CHANCELLOR [ELDON], admitting the practice to be doubtful, expressed his opinion, that the costs ought not to be given, unless mentioned in the notice of motion; and then the Motion is made at the peril of costs (4).

As to the construction of the terms of the usual order, according to the present practice, for time "to plead, answer, or demur, not demurring alone," see, *ante*, the notes to *Lansdown v. Elderton*, 8 V. 526; the note to *Tomkin v. Lethbridge*, 9 V. 178; and the note to *De Minkuitz v. Udney*, 16 V. 355.

(1) Against debts of equal degree.

(2) See Beames on Costs, 324, &c. In *Balch v. Symes*, 1 Turn. 87, it is decided, that the Lien does not attach upon the Will of the client. See, *ante*, *Ex parte Sterling*, vol. xvi. 258, and the note, 259.

(3) *Ante*, vol. x. 444; *Lansdown v. Elderton*, viii. 526, and the note, 527. In that case the Motion was to discharge the Demurrer; in the other, that it should be expunged, or over-ruled, being coupled with an Answer.

(4) See Beames on Costs, 240, n. (96).

MASTERMAN, *Ex parte*.

[1811, Nov. 9.]

ORDER by Lord Thurlow, that a Petitioning Creditor, who has neglected to prosecute a Commission of Bankruptcy, shall not have another.
Practice of striking a Docket for the purpose, not of a Commission of Bankruptcy, but of compelling a composition, disapproved, and not aided.

THE petitioner sued out a Commission of Bankruptcy a year ago: but upon an agreement for a Composition the Commission was not prosecuted. The debtor having failed in paying some of the instalments under the composition, the petitioner applied to strike a docket for another Commission: but an objection was taken in the Bankrupt Office upon a practice, founded upon an Order (1), alleged to have been made by Lord Thurlow, and acted upon, that a petitioning creditor, who neglected to prosecute the Commission within the limited time, should not sue out another Commission without special leave.

Mr. Cullen, in support of the Petition.

The Lord CHANCELLOR [ELDON].—This seems to me precisely the state of facts, to which Lord Thurlow's intended Order was to be applied. I am sorry to observe an old practice still prevailing of striking a Docket for the purpose, not of following it up with a Commission, but merely to compel the debtor to come into a composition, by prevailing on his friends to contribute. In a late instance a Solicitor in the country directed his agent in town to strike a docket, but on no account to proceed to a Commission, until it was seen what would be the effect.

* I will make no Order on this application. If you are [* 299] entitled under your interpretation of that Order to the Commission you do not want my leave: if you are not so entitled, I will not give you leave; as I do not approve this use of a Commission of Bankruptcy to grind an unfortunate man; and will give no assistance to such a purpose (2).

THE court will be more disposed to supersede than to aid a commission which appears to have been taken out with a view to press a private arrangement by composition: see, *ante*, note 7 to *Ex parte Stokes*, 7 V. 405.

(1) This Order is mentioned in Mr. Elley's Collection of Orders in Bankruptcy, as a direction by Lord Thurlow, 6th December, 1788, to the Secretary of Bankrupts, upon the petition of Sir Richard Arkwright in the bankruptcy of Gibson and Johnson, invariably acted upon by the Secretary.

(2) *Ex parte Smith*, 1 Rose's Bank. Cas. 332. See *Ex parte Thompson*, *ante*, vol. i. 157, and the notes, 158; xiv. 85.

LOWNDES v. CORNFORD (1).

[1811, Nov. 9.]

INJUNCTION upon an interpleading Bill against Bankrupts and their Assignees by a debtor to the estate, sued by the Bankrupts with the view of indirectly contesting the Commission.

A COMMISSION of Bankruptcy issued in 1810 against Thomas and George Cornford; to whom the Plaintiff was indebted to the amount of 38*l*. They brought an action against him; alleging that the Commission was invalid, and they intended to dispute it. Being also threatened by the assignees he filed a Bill of interpleader; and moved for an injunction on bringing the money into Court. The bankrupts did not appear.

Mr. *Raithby*, in support of the Motion, admitted, that this was a new case of interpleader.

Sir *Samuel Romilly*, for the assignees, said the Lord Chancellor had given the bankrupts liberty to bring an action, in order to contest the validity of the Commission; who, instead of taking that course by trying it with their assignee, chose to try it in their absence indirectly by bringing an action against a debtor for a small sum: who is not willing to enter into such a litigation.

[* 300] * The Lord CHANCELLOR [ELDON].—Though I do not recollect an instance, yet this seems to me a case of interpleader: otherwise consider the situation of the debtor. I never will permit the bankrupts to proceed in this action to affect the Commission.

The Order was made for the Injunction (2).

1. This case is likewise reported in 1 Rose, 180.

2. In *Harlow v. Crowley* (a case decided in the Exchequer, but reported in Buck, 275), the chief baron is said to have declared, he never heard of a bill of interpleader between a bankrupt and his assignees. But the principal case cannot be in the slightest degree shaken, because it was not called to mind upon that occasion. As to the general doctrine with respect to bills of interpleader, see, *ante*, the notes to *Dungey v. Angove*, 2 V. 304, with the farther references there given.

(1) 1 Rose's Bank. Cases, 10.

(2) See a similar Injunction refused by the Court of Exchequer: *Harlow v. Crowley*, Buck, 273.

LANGDALE, *Ex parte*.

[1811, Nov. 9.]

PARTNERSHIP by agreement for a participation in profits or their application (a). Partner without participation of profit by lending his name; though contracting, that he shall suffer no loss (b), [p. 301.]

THE bankrupt had kept a canteen in the neighborhood of some barracks; and the question upon the petition of the assignees was, whether the brewers, who supplied him with beer, were to be considered as partners in respect of their participation of the profit under their agreement; which according to their representation was, that they were to pay half his rent, supplying him with beer at 4*l.* 5*s.* per barrel; the usual price being 3*l.* 8*s.* The bankrupt's account of the agreement was, that the brewers were to have out of the profits 17*s.* per barrel for the half of the rent; the bankrupt taking the rest; of which 5*s.* was for drawing the beer, and 1*s.* for collecting the money.

Sir Samuel Romilly, and Mr. Trower, in support of the Petition. Mr. Leach opposed it.

The Lord CHANCELLOR [ELDON].—A man, who is to [301] have no profit, may be a partner, if holding himself out as such; as by lending his name. He may also be a partner, when the contract is, that he shall suffer no loss; and I agree, it is not the less a partnership, because part of the contract is, that they are not to suffer by bad debts, the personal negligence of him, who has the custody of the article, by fire, &c. The true criterion is, whether they are to participate in profit. That has been the question ever since the case of *Groves v. Smith*.

I cannot refuse to let this case go to a Jury. The agreement to sell their beer to him at a higher price than to others would not make them partners: but the bankrupt's representation is so different, that it is impossible to determine without the decision of a Jury upon the question, whether this was an agreement for a division of the profits, or the brewers stood only in the relation of vendors of the beer to this retailer at 4*l.* 5*s.* per barrel, in consideration of paying half his rent, selling to others at 3*l.* 8*s.* If the actual contract give a claim upon the

(a) See, *ante*, note (b) *Ex parte Hamper*, 17 V. 403.

(b) Even if it were the intention of the parties that they should not be partners, and the person to be charged was not to contribute either money or labor, or to receive any part of the profits, yet if he lends his name as a partner, or suffers his name to continue in the firm after he has ceased to be an actual partner, he is responsible to third persons as a partner, for he may induce third persons to give that credit to the firm which otherwise it would not receive, nor perhaps deserve. 2 Kent, Com. (5th ed.) 32; *Smith v. Watson*, 2 B. & C. 401; *Lacy v. Woolcott*, 2 D. & R. 458; *Cheep v. Cramond*, 4 B. & Ald. 663; Story, Partner. § 64, 65.

Where a man is merely a nominal partner, as he has no real interest, there seems no necessity of his joining, as a party, in any partnership suit, although there is no doubt that he may so join. Story, Partner. § 240. See also *Kieron v. Sanders*, 6 Adolph. & Ell. 515; *Kell v. Nainby*, 10 B. & C. 20.

profits or the application of them, that is partnership. If there was no claim upon the profits, or the application of the profits, then it is not partnership (1).

An Issue was directed.

SEE the notes to *Ex parte Hamper*, 17 V. 403.

[* 302]

MONTESQUIEU v. SANDYS.

[1811, Nov. 7, 11.]

PURCHASE of a reversionary Interest by an Attorney from his Client, though in the event advantageous, without fraud, or any representation, the proposal coming from the Client, and no confidence upon that subject, both ignorant of the value.

The Bill charging fraud and misrepresentation, confidence and knowledge on one side, with ignorance on the other, and not bringing forward the only incorrect circumstance, the receipt taken as for money paid, though the consideration was by deduction from a Bill of Costs, not then of that amount, dismissed without Costs (a).

Principle of relief against transactions between Attorney and Client, with misrepresentation from knowledge, acquired in the Client's transactions, or assumed; considered either as misconduct or negligence, [p. 308.]

Jurisdiction as to the valuation of reversionary uncertain interests, depending on lives, [p. 311.]

Whether a deficiency in value of one third, with breach of duty as an Attorney, &c. is not sufficient to set aside a purchase from his Client, *quære?* [p. 312.]

Valuation not regulated by *Pretium Affectionis*, [p. 312.]

An Attorney shall not take a gift or reward from his Client, while the connection subsists. It must, as in the instance of Guardian and Ward, be previously dissolved, [p. 313.]

THE Bill stated, that the Plaintiffs, the Baron and Baroness De Montesquieu, were in right of the Baroness entitled to an undivided fourth part of the manor of Upper Hardres, in the county of Kent,

(1) *Ex parte Hamper*, ante, vol. xvii. 403; and the note, 404.

(a) Where the relation of Client and Attorney is dissolved, and the parties are no longer under its influence, they are to be regarded as other persons. And the same principle applies, where the transaction is totally disconnected with the relation, and concerns objects not dependent on that relation. 1 Story, Eq. Jur. § 313; *Howell v. Baker*, 4 Johns. Ch. 126, 127.

While the relation subsists, and in the matter to which it relates, the Attorney shall derive no benefit from the bounty and negotiations of the client. See, ante, note (a) *Newman v. Payne*, 2 V. 199; 1 Story, Eq. Jur. § 310.

As to the jealousy with which Courts of Equity regard transactions of this nature, see 1 Metcalf & Perkins, Dig. Att. and Cl. viii. pl. 369, et seq.; *Rose v. Mynott*, 7 Yerger, 30; *Berrien v. McLane*, 1 Hoff. Ch. 421; *Wheelan v. Wheelan*, 3 Cowen, 537; *Starr v. Vanderheyden*, 9 Johns. 253; *Mills v. Ervin*, 1 M'Cord, Ch. 524.

As to purchases by an agent, note (a) *Massey v. Davis*, 2 V. 317; as to purchases by a trustee of a *cestui que trust*, note (a) *Whitchote v. Laurence*, 3 V. 740; note (a) *Campbell v. Walker*, 5 V. 678.

with estates belonging thereto, and also an undivided fourth part of the advowson and right of presentation to the rectory of Upper Hardres and Stelling. In 1802 an agreement took place for a partition of all except the advowson; and the Plaintiffs and the other co-parceners employed the Defendant as their Solicitor for carrying the said agreement into execution. The advowson was at that time vested in the Rev. John Charles Beckingham, Elizabeth Denward, the Plaintiffs, and William Haugham, in co-parcenary: Mr. Beckingham then the incumbent on his own presentation: the next turn being vested in Mrs. Denward; and the second in the Plaintiffs; who sold their right to the Defendant in consideration of 100*l*.

The Bill farther stated, that the Defendant caused the necessary surveys and valuations of the estates to be made for the purpose of the partition; and having by those means made himself well acquainted with the value of the Plaintiffs' interest in the advowson, and being confidentially employed by them as their Solicitor in other business then depending, proposed the purchase to the Plaintiffs in July 1803; to which they, having *implicit [* 303] confidence in him, and being wholly uninformed of the nature and value of such species of property, except by the said representation, agreed: that the Defendant represented, that the Plaintiff, the Baron, was indebted to him for business done as a Solicitor in a larger sum; from which he proposed to deduct the 100*l*.; not having then delivered his bill; that the Plaintiffs have lately discovered, that they were deceived; that 100*l*., if paid in money, was a grossly inadequate price; their interest at that time being worth above 760*l*.; and Mr. Beckingham being since dead, and Mrs. Denward having presented the Rev. Thomas Wiggzell, is now worth above 4000*l*.

The Bill prayed that the conveyance may be declared void, and cancelled, and a reconveyance on payment of 100*l*. &c.

The Defendant by his answer denied, that he caused the plans, surveys, and valuations, to be made with a view to carrying into execution the partition; or that he was at all consulted or concerned in making such plans, &c.: being employed by the Plaintiffs merely in preparing the deeds for making the partition; and not otherwise as their Solicitor for that purpose; stating that he was at that time employed by the Plaintiffs as their Solicitor in other business then pending, but of very little importance: that the Plaintiff, the Baron, asked the Defendant, whether he should like to purchase his share of the advowson, mentioning at that time no sum of money; but, observing, that in case Mrs. Denward, who was then very old and infirm, died in the life of Beckingham, the Plaintiffs would be entitled to the next presentation; the Defendant saying, that it would devolve to the assigns or devisees of Mrs. Denward: and it was agreed, that for the purpose of ascertaining the law in that respect the Defendant *should state a case to the Counsel [* 304] and intimate friend of the Plaintiffs: who gave his opinion, that it would go to the heirs, assigns or devisee of Mrs. Den-

ward. The Plaintiff then repeated his offer to the Defendant; who said he would purchase it, if a price was asked, which would justify him in the purchase of so distant a prospect. The Plaintiff in a few days told the Defendant his price was 100*l.*; which the Defendant could not consider as too much; adding, that the money was nothing; as he (Plaintiff) did not want it; that he owed the Defendant a good deal of money; and it might be deducted from his bill. The Defendant then accepted the offer. He denied, that he made the proposal; and represented 100*l.* to be the full value, &c. or made any representation to depreciate it; except correcting the erroneous idea the Plaintiffs had formed of their rights in the event of Mrs. Denward dying in the life of Beckingham.

The Answer farther stated the Defendant's belief, that the Plaintiff by his offer meant to pay the Defendant a small compliment on account of a connection by marriage between the families; observing, that he had a large family, and it might be of service to some of them; that it was a lottery ticket, &c. and under that impression the Defendant took upon himself the expense of making out the title and of the fine.

Beckingham, who was in a perfectly good state of health at the time of the purchase, died in 1807 by a fall from his horse; and, Edward Gregory, who was intended for the next presentation by Mrs. Denward, not being of the proper age, Wigzell, then about 60, was presented. The Defendant admitted, that his bill was delivered in January 1806, amounting then to 145*l.* 2*s.* though at the time of the purchase not exceeding 91*l.* and on the 11th of January, 1806, the Plaintiff paid him *45*l.* 2*s.* giving a receipt for that sum, as the balance due.

The valuations produced in evidence varied from 75*l.* to 150*l.* The charges of misrepresentation, &c. not being supported by any evidence, were abandoned at the Bar. The receipt, given upon the purchase, appeared to be for 100*l.* paid.

Sir Samuel Romilly, Mr. Leach and Mr. Daniel, for the Plaintiff. —The relief is sought upon this ground; that a Solicitor has obtained from his client a bargain at about one seventh part of the value. If this were defended as a gratuity, a Solicitor cannot, while his bill for business done is depending, take a gratuity from the client. It is however not put upon that ground, but as a right, created by contract. Circumvention is not imputed to the Defendant: but he was a professional man, dealing with his client for property; not making a valuation directly; but valuations passing under his immediate inspection; the property, though undoubtedly saleable, of a very peculiar nature, giving great advantage to a professional man, dealing with a foreigner, ignorant in what mode the sale was to be effected. A professional man, though he may purchase from his client, is bound to represent the value to him truly. The Defendant did not state the value expressly; but permitted his client to conceive, that it did not exceed 100*l.* It is impossible to add to the definition

given by your Lordship in the case of *Gibson v. Jeyes*, (1), of the duty of an attorney dealing with his client; and this case must be decided upon the principles there stated.

* Mr. *Richards*, Mr. *Hart*, and Mr. *Boteler*, for the Defendant.—The effect of sustaining this Bill must be, that a Solicitor cannot purchase from his client under any circumstances, where the value is liable to the least doubt. How is it possible in any of these cases to say without any doubt, that the sum given is a fair price; the valuation depending upon life, and these calculations, upon such a subject so constantly baffled by nature? The health of the party, a circumstance of the utmost importance with reference to the character of the contract, as fair or unconscientious, is never taken into consideration by these calculators; nor is the principle, upon which the calculation is made, intelligible. [*306]

In this case the incumbent was at the age of forty-eight, in perfect health, with the prospect of a long life. The rule is to be applied to the existing case, not as a general rule of ethics. The subject of contract was a subject of fair speculation; in truth a lottery ticket, the advantage depending entirely upon the event. Though there is no pretence of influence, there is no doubt, that the Plaintiff intended to give some advantage to the Defendant. The client chose to act for himself, upon his own judgment; not calling upon the attorney to act for him upon that subject; and had offered it to several persons. Here is no confidence placed in the Solicitor, disabling him to contract. It is proved that the Plaintiff, so far from relying on the Defendant's advice as to the prudence of his contracts, was in the habit of forming his own estimates; employing him merely in carrying them into execution. The general propositions in *Gibson v. Jeyes* were used with reference to the strong and peculiar circumstances of that case.

* Sir *Samuel Romilly*, in reply.—The Court is required [*307] to act upon general principles in a case, comprising these few facts; an attorney, no bill delivered, and permitting his client to suppose his debt to be more than it really was, purchases from him at a great undervalue: the consideration not paid in money, but by writing off that amount from the bill. The accident of the incumbent's death increasing the value, led the Plaintiff to inquire into the value at the time of the sale, and upon the result of that inquiry to file the Bill. The rule laid down in *Gibson v. Jeyes* cannot be understood as confined to the circumstances of that case. It does not occur in the judgment; but is an abstract proposition, stated by the Court, interrupting the argument, to lay down a general rule.

When the Plaintiff represented his intention to sell this property for the purpose of discharging the large debt he supposed himself to owe to the Defendant, was not the latter bound by his duty to com-

(1) *Ante*, vol. vi. 266; *Wood v. Downes*, *ante*, 120. See the notes, vi. 280; ii. 204.

municate the small amount of that debt, and not to permit him to proceed under that erroneous conception, that it was necessary by those means to satisfy a debt, which in fact he did not owe. These calculations are made upon a view most unfavorable to the Plaintiff; considering the life to be perfectly good; and taking for the next successor the youngest life: viz. at the age of twenty-four, the earliest capable of priest's orders.

Nov. 11th. The Lord CHANCELLOR [ELDON].—If the case, represented by this Bill, was supported by admission or evidence, it would be impossible to * maintain, that the Plaintiffs are not entitled to relief; as, whatever may be the conclusion with regard to the capacity to purchase of a person, having acted in the relation of an attorney, and who, if not continuing so to act, had by means of his transactions, while holding that character, acquired at the expense of his client a knowledge of his property, the rule is clear, if the attorney in the course of his client's transactions had acquired a knowledge of the value of the property, which the client had not; and with that knowledge made a representation, and a proposal to purchase, as of a certain value, that, which he knows to be of much higher value; undertaking to make that representation, knowing the value, or as if he knew it; the duties, attached to that relation, requiring him not to make it, unless he knew the value. There could be no doubt therefore upon the relief, if the Defendant knew at the time of this contract, that this interest was worth, I do not say 750*l.*, but materially more than the sum of 100*l.*, represented by him as its full worth, and proposed as the price; so conducting himself in conversation and demeanor as to lead these parties, ignorant of the value, to confide in that representation, which he either knew to be false, or rashly made, not knowing it to be true.

Cases of this description more than any other impose upon the Court the direct duty of giving the most accurate attention to the real circumstances: the relief being required sometimes upon misconduct and fraud, bearing particularly hard upon moral character, in other instances not upon such grounds, but on that degree of negligence in the performance of duty, which is sufficient to defeat transactions arising out of that negligence. It is due to this Defendant to say, that there is no evidence whatever in support of the Bill, except what * is to be collected as to the value, and an exhibit by one witness to prove the connection of attorney. The imputation of imposition and misrepresentation is therefore abandoned at the Bar; and that was absolutely necessary upon the circumstances; which are shortly these.

Mr. Beckingham, entitled to the first presentation, had presented himself. At the time of this transaction he was forty-eight, very healthy, as likely to live as any person of his years, on whose life any one would have purchased an annuity: the person next entitled a lady advanced in years; and her intention, as it appears, known at the time, to present a boy aged fourteen, if capable of taking; as was probable. It is clearly proved, that with regard to the plans,

surveys and valuations of that property, which was to be the subject of partition, other persons were employed; and the Defendant was to prepare the deeds of partition: a circumstance affording no farther inference, than that it was likely he would from that employment gain some knowledge of the valuations the others were to make; and might therefore form some probable conjecture upon the value of the advowson; taking it that the lands to be divided were in that parish. Upon the question of fraud Houghton's evidence is, though not conclusive, very material; that knowing the incumbent to be a sound life, and the intention of the person entitled to the next presentation, he, though owner of the manor, would not have given 100*l*. It was afterwards offered to Taylor. At that time the Plaintiff must have supposed, that he had something more valuable to sell than it afterwards proved. His notion, that Mrs. Denward's representative would not have been entitled to the next turn, does not appear to have been then displaced, and he was willing then to part with his interest in exchange for two or three acres, the value of which is not ascertained.

* There is no evidence of conduct as to representation; [* 310] except the answer; by which the Defendant states, that he knew nothing of the value; and would not have given 150*l*. for the purchase; that his connection by marriage with one of the coparceners, a relation of the Plaintiff, led to the offer by the Plaintiff to him; denying, that any proposal, or any representation whatever of the value, came from him; and that he told the Plaintiff his bill was above 100*l*.; an awkward circumstance as alleged in the bill; which the answer represents thus; that the Plaintiff said, a good deal of money must be due to him, from which it might be deducted. In that month of August there was not 100*l*. due to him. It stood upon the conversation without any agreement in writing. There is nothing in the deeds, which were settled by an eminent conveyancer, but what is quite of course; and when they were executed, in November, there was not 100*l*. due. The circumstance, that they were permitted to sign a receipt for 100*l*. as money paid, which was to be discharged by a deduction from the bill of costs not of that amount, that sum being understood to be paid by an attorney, the receipt witnessed by two other attorneys, and no voucher passing, is a subject of regret. At the execution of the conveyance the sum due was 91*l*.: business then in progress soon carried it beyond 100*l*.: and between that year 1803 and 1806 it reached 145*l*.

The value of the next turn after the death of Beckingham, and on account of the incapacity of young Gregory, the presentation of a person at the age of sixty, which in consequence of those events is estimated at between 3 and 4000*l*. cannot affect a contract, made before those circumstances existed; and though, it is true, the rights of presentation might have *been exchanged, [* 311] it is straining too much to require a purchaser to look to that, as a probable event.

In January 1806, when they came to a settlement of the account, the Defendant's bill being then 145*l.*, and the items all certainly very reasonable, the facts as to the bill and its amount at different periods were before the Plaintiff; and he paid the balance, deducting the sum of 100*l.*, the price of his interest in the church: that transaction taking place 2½ years after the conveyance; and with all the observations due to the inaccuracy attending the receipt, and the omissions to notice it, when the transaction was closed, it is too much to lay hold of that circumstance, which, though known so long, up to the period of filing the bill, is not adverted to in the pleadings.

It is said for the Defendant, that this was a subject of no fixed value; that the Court has no means of judging of it; that it is like a lottery ticket; and the usual arguments upon annuities and reversionary interests are resorted to. It is fairly observed, that, to get at the value, the subject is looked at by the Plaintiff in the worst view: that the incumbent, of the age of forty-eight, is to be regarded as an excellent life; that upon the next turn a clerk at the lowest age capable of taking will be presented; putting every thing in the most unfavorable light. I am aware of the difficulty of being right in the article of value upon these subjects; the calculations upon which always surprised me; but the jurisdiction has been so long exercised, that it cannot now be declined. The effect of declining it would go to this extent; that, if such an interest had been conveyed upon trust to sell at the best and most reasonable price, and the trustee [* 312] had himself purchased it, the Court * could not inquire, whether he had given the best and most reasonable price.

The valuations differ considerably. The highest, 750*l.*, is reduced by the lowest to 150*l.*; and, supposing the Defendant is to be considered as the attorney, I am not prepared to say, that a deficiency of one third of the value, connected with a plain breach of duty, and the other circumstances, would not be sufficient to set aside the purchase: but, considering him as bound to get the most that could be obtained, the inquiry, how much any particular person would choose to give for such a subject, is not an accurate mode of ascertaining the value; which cannot depend on what individuals might from particular views be induced to give; not offering what in a sense may be called the market price of such property. I cannot take into consideration, that the Defendant did not make charges, to which he was entitled; that forming no part of the contract.

This however cannot be represented as the case of a Defendant proved to have known the value, and of a Plaintiff ignorant of it, to whom the other made the proposal. On the contrary, it is proved, that the Plaintiff made the proposal: the Defendant denies, that he knew the value: and there is no proof, that he knew it: but, though there is some proof in support of the assertion in the answer, that the Plaintiff knew the value, and acknowledged that he did, the result of all the evidence is, that he was equally ignorant of it.

That reduces the case to a state of facts, not represented by these

pleadings, which would raise a question of considerable importance : an attorney, connected with his client in different matters, some past, some depending, takes a conveyance of part of the client's property, as a * purchaser, in part discharge of a Bill of [* 313] Costs not at that time delivered : the money, the consideration for the purchase, exceeding the amount due at that time, but less than the Bill was likely to be at the final settlement ; and it was settled afterwards, in January, 1806, partly upon the ground of this purchase, and the balance by payment in money. This is not a gift to an attorney, a reward, taken by him, beyond the amount of his bill, for service done ; not therefore within those cases, which have wisely established a principle, that would reach the transaction, had it been admitted or proved, that the Defendant took this conveyance, before his bill was delivered, as a reward for service done as an attorney : viz. that an attorney shall not take from his client a gift or reward, while standing in that relation, the connection between them subsisting with the influence attending it ; though the transaction may be as righteous as ever was carried on ; that the connection must, as in the instance of guardian and ward (1) be *bona fide* dissolved, before he can take any thing beyond his regular fees. On the other hand, there is no authority establishing, nor was it ever laid down, that an attorney cannot purchase from his client what was not in any degree the object of his concern as attorney ; the client making the proposal, himself proposing the price, no confidence asked, or received in that article, and both ignorant of the value. Under such circumstances, he is not the attorney *in hac Re* ; and therefore, not being under any duty as attorney to advise against the act, he may be the purchaser.

This Bill is not filed upon that ground ; not charging the Defendant with taking this property as a gift * or a reward [* 314] for services past or future ; but seeking to set aside the purchase upon this ground ; that the Defendant by means of an employment, in which he is not proved to have been engaged, had gained a knowledge of the value ; and with that knowledge, which the client had not, made a representation of the value to him ; who, confiding in that representation, made the proposal ; which has its origin therefore from a representation made with knowledge on one side and ignorance on the other. Such is the nature of the case upon this record. It does not appear to me, that the fact can be established, which would raise the question upon the other view of the case ; which, if more distinctly brought forward, could not, I think, be substantiated ; and though the transaction as to the receipt was very incorrect, it would be far too much to give relief upon those circumstances, which are not made a ground of complaint upon the record.

Upon the whole, therefore, the facts of this case do not afford a

(1) *Hatch v. Hatch*, ante, vol. ix. 292.

sufficient ground for relief; but I shall dismiss this Bill without costs.

1. Not only the actual substance of a confidential relation between the parties to an impeached transaction, but any probable suspicion that, although the connexion has been brought to a close, yet the influence growing out of it may not have ceased; or that advantage has been taken by one party, of information respecting the value of the subject of contract which he acquired whilst he held a situation of confidence, but which he did not fully disclose to his *cestui que trust*; any of these circumstances may lay a sufficient ground for the interference of equity, in cases where, if no such confidence had been reposed, equitable relief could not be given: see, *ante*, notes 2, 3, 4, to *Crouse v. Ballard*, 1 V. 215. And it is quite clear, that a *gratuity* received by an attorney from his client, whilst the latter was in any degree under the management or influence of the former, cannot be retained: see note 2 to *Hatch v. Hatch*, 9 V. 292. Even a *purchase* made by a person who has *ever* been in a situation of trust as to the vendor will be very jealously scrutinized, and the *onus probandi* that the confidential office was at an end, and also of repelling any charge that information acquired during its continuance, and which might by possibility have affected the agreement, was concealed from the *cestui que trust*, will rest with the *quondam* trustee or confidential adviser: see note 1 to *Whichcote v. Lawrence* 3 V. 740: but, when the fairness of the transaction in all these points is satisfactorily proved, the purchase may be sustained: see note 2 to *Beaumont v. Boulton*, 5 V. 485.

2. Vested reversions are as much property as an estate in possession is; it may, therefore, equally be made the subject of contract. But the sale of a reversionary interest is so commonly the act of a distressed person, that a strict scrutiny is thought proper, to ascertain whether advantage has not been taken of the vendor's distress for money: see notes 5, 6, to *Crouse v. Ballard*, 1 V. 215.

3. The civil law required, that the price paid for a thing purchased should exceed half its value, in order to sustain the bargain; but that principle has not been adopted by our courts as a rule for their guidance: see note 5 to *Mortlock v. Buller*, 10 V. 292.

[* 315].

THE ATTORNEY GENERAL v. MAGWOOD.

[ROLLS.—1811, AUGUST 5.]

LEASE of a Charity Estate set aside for undervalue, if considerable. An Under-lease at a Fine, not conclusive; part being ascribed to the Good-will of a trade established, and repairs. Inquiry directed, whether the rent was fair and adequate; distinguishing, how much of the premium on the Under-lease resulted from the Good-will and repairs, and how much from the value of the lease above the rent reserved to the Charity.

THE object of the Information was to set aside a lease of a Charity Estate, consisting of two houses, for a term of twenty-five years at a rent of 100*l.* a-year, and to have the benefit of an under-lease or assignment by the lessee, accounted for out of his assets by his administratrix. The houses had been separately let at the rent of 30*l.* a-year each, for thirty-eight years, expiring in 1809, to the father-in-law of Magwood, the last lessee.

The imputation of fraud was denied, and not supported by evidence. The charge of under-value, besides the contradictory evidence of surveyors, was supported by the circumstance, that Mag-

wood in a few months underlet one of the houses, the least valuable, at a fine of 960*l.* and a rent of 50*l.* a-year to the Defendant Doxey ; who afterwards assigned to another person also at a premium. Against the inference from those facts, that the premium was substituted for rent, the Defendant insisted upon expense incurred in repairs, and in re-establishing the trade ; the license having been lost by the misconduct of a former tenant.

Mr. *Leach*, in support of the Information, referred to *East v. Myal* (1), followed by the late cases (2).

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The object of this Information is to set aside a lease of *two [*316] houses. The lease is impeached on the ground of great under-value. The information contains some charges of fraudulent practice : but that ground is abandoned ; and there is nothing in the case, that warrants the imputation. The houses were previously let separately for thirty-eight years, expiring in 1809, at a rent of 30*l.* per annum each ; the tenant covenanting to repair and insure.

An attempt to prove, that this rent is unreasonably low, was made in two ways : first, by the evidence of two surveyors ; secondly, by the fact, that Magwood in a few months underlet the public-house at a premium of 960*l.* and a rent of 50*l.* per annum. This is said to be a fair criterion of the true value of one of these houses ; and, as the other is admitted to be the more valuable of the two, the conclusion is, that the bargain was really much more disadvantageous to the Charity than is represented in the estimate. The relators contend, that, not meaning to disturb the under-lease or assignment, their relief is to set aside the lease, so far as respects Magwood's interest ; and to have the premium, received by him, out of his assets : viz. the advantage which he has derived at the expense of the Charity by the reduced rate of the rent.

That a lease of a Charity Estate may be set aside for under-value, if considerable, is a point upon which the decisions leave no doubt : the cases of *The Poor of Yervel v. Sutton* (3), *Eltham Parish v. Warreyn* (4), and *The Attorney General v. Gower* (5). In the case of *Eltham Parish v. Warreyn* one of the resolutions is, that "the lease, being made at an under-value, is a breach of trust, * and fraud to deprive the charitable uses of the true value [*317] of the land ; and the Commissioners may decree the lease to be void, and surrendered ; and that the lessee shall pay the true profits of the value of the charitable use above the rent reserved."

In *The Attorney General v. Lord Gower* Lord Hardwicke, as to the leases to Lord Gower and the other Defendants, directed an ac-

(1) 2 P. Will. 284.

(2) *Ante*, *The Attorney General v. Backhouse*, vol. xvii. 283; and the references in the note, vi. 453, *The Attorney General v. Green*.

(3) Duke's Char. Uses, 43.

(4) Duke's Char. Uses, 67.

(5) 9 Mod. 224.

count of the annual value of the premises and of the rent reserved, and an inquiry whether it was adequate or sufficient, or not.

In this case it is to be seen, how far it is proved, that these houses have been considerably underlet. The evidence of the two surveyors to that point is met by that of other surveyors; who say, they were let for full as much as they were worth. As to the public-house separately, it is estimated by different witnesses, at 55*l.*, 50*l.*, and 30*l.*

Upon this state of the evidence it is difficult to say, it clearly establishes an undervalue to an extent that will justify setting aside the lease. There are other criterions of value, which at first sight appear more decisive. The circumstance, that two different persons gave large premiums for less interests, seems to furnish evidence of a value much beyond that, for which this interest was granted. That however is said for the Defendant not to be a necessary conclusion: a considerable part at least of the increase is to be ascribed, not to the intrinsic value, but to the good-will established, and the money laid out in repairs. It appears, that the house had been let to a person, whose daughter Magwood married; that it was underlet to Bradley, by whose misconduct the license was taken away; and consequently its value as a public-
[* 318] house lost. Under what character or title Magwood's possession stood does not appear. It is proved that he re-established the trade at a considerable expense; and laid out some money, it is not said how much, in repairs. Other repairs were done, after he obtained this lease. Some of the particulars are specified by the tradesmen. The amount does not distinctly appear. Two witnesses say, they believe 300*l.* was laid out in the whole. Upon the evidence, the witnesses being persons actually employed in the repairs, I must take it, that some material repairs were made. The representation of Doxey, the under lessee of Magwood, is, that he required, as the condition for giving his premium, that the house should be put in a good state of repair. I cannot infer from the amount of that premium, that the landlord had so much less rent than he ought to have.

As to the good-will, where there is a treaty for a house, in which a particular trade is carried on, the landlord by refusing to renew may occasion a loss to the tenant; but cannot appropriate to himself the advantage arising from the trade of that house. The tenant, not being under an obligation to continue the trade, may relinquish it; and the consequence will be, that the landlord, refusing to renew, will have the house without the trade established there. Though therefore the tenant has an inducement to give some additional rent, to prevent his removal, the landlord has no pretence to consider the good-will as his property. The circumstance therefore, that Magwood obtained a premium for the good-will, is no proof, that he got the lease at too low a rent.

Then, as to the repairs, if Magwood from 1806 did augment the value by repairs, it is clear, that he had a right to a higher

premium from an under-lessee, or assignee, than if he had let, or assigned, the house in the state, in which he found it. I am not warranted by the evidence to say, that no part of the premiums was paid in consideration of money expended by Magwood in repairs; but it is clear, that some part was in consideration of the good-will; and, until it is ascertained, how much was upon that account, the profit, resulting merely from the low rent, is uncertain; and the relators are not entitled to the whole premium, which they demand, if any part was paid upon these accounts.

All therefore, that can now be done, is to direct a reference to the Master, to inquire, whether the rent, reserved for the two houses, was fair and adequate; and to direct, that in considering the value of the premiums, received for the underlease, the Master is to distinguish, how much resulted from the good-will, and the repairs after Magwood's renewal; and how much from the value of the lease above the rent, reserved by the lessors (1).

SEE the note to *The Attorney General v. Green*, 6 V. 452.

THE ATTORNEY GENERAL v. BROOKE.

[1811, Nov. 18.]

DECREE on default setting aside a lease of a Charity Estate, with covenant for perpetual renewal, and directing an account of the annual rent. Rehearing permitted on paying costs, not disturbing proceedings before the Master to the draft of a Report of what was due: but the money not to be paid into Court before the Report made. Petition, not Motion, the proper application.

The proper relief given upon an Information for a Charity without a specific prayer.

Re-hearing of course on the Certificate of Counsel, [p. 325.]

Trustee for a Charity cannot without an adequate consideration let for ninety-nine years; not being the ordinary course of provident management; much less with covenant for perpetual renewal without an equivalent for the inheritance, [p. 326.]

THE Information prayed, that a lease, granted by the trustees of a charity estate, for the consideration of 15*l.*, and at a rent of 15*l.* a year, with a covenant for perpetual renewal, may be set aside and declared void, and for general relief.

The facts, as they appeared upon * the answer of the [* 320] Defendant Brooke, were, that the lease having been in the following year assigned at an advanced rent of 30*l.*, which was in 1794 increased to 60*l.*, was in that year assigned to the Defendant in consideration of 200*l.* by a person, who had purchased it by auction.

Bryant, who was presented by the answer as an under-lessee,

(1) See the next case, and *The Attorney General v. Wilson*, *post*, 518

being made a party, by his answer stating, that he was only tenant from year to year, disclaimed. At the hearing in 1810 Bryant appeared: but Brooke made default: and a Decree was drawn up in the usual course, dismissing the information as against Bryant with costs, to be paid by the other Defendant Brooke; that the lease should be delivered up to be cancelled; and that the Master should set a value upon the premises by way of annual rent, from the time of the Defendant's purchase in 1794: the Defendant to be charged with the amount.

The Decree having been made absolute, proceedings were had before the Master to the draft of a report, stating 1800*l.* to be due from the Defendant on account of the rent. The Defendant applied by Motion to discharge the Order, making the Decree absolute, and to show cause against the Decree *nisi* (1); and, the Lord Chancellor directing him to apply by Petition to rehear the cause, a Petition was presented; praying liberty to have the cause re-heard, and offering to pay all the costs.

Mr. *Leach* and Mr. *Edwards*, in support of the Petition.—The questions are, first, whether a Defendant, suffering under a Decree obtained by his default, is absolutely concluded; or is entitled to have it re-heard upon such terms as will do the Plaintiff substantial justice; and, if that is still open, secondly, [* 321] whether this Defendant is *entitled to a re-hearing upon consideration of the merits of this case. There is no authority, that the Defendant is absolutely concluded by a Decree so obtained; and the necessity of entering into the merits is not to be lightly admitted. A re-hearing, though certainly an indulgence, and in the discretion of the Court, is subject to certain rules. It is never refused, if Counsel certify, that the cause is a proper subject of re-hearing: it is upon that certificate obtained merely of course: and this Defendant, making the relators compensation in costs, is equally entitled to re-hear this Decree as if it had been pronounced upon a full discussion of the merits. Upon principle it would be difficult to establish, that a Defendant, against whom a Decree has passed upon consideration of the merits, should have this opportunity, and yet a Decree by default, to which the attention of the Court was never drawn, the mere Decree of the Counsel, viz. such as he can abide by, should be absolutely conclusive.

In the case of *Cunningham v. Cunningham* (2), when the costs of a re-hearing were limited, Lord Hardwicke admitted the Defendant to re-hear upon the terms, that would have been imposed upon him, had he taken the regular course of moving to discharge the Order for making the Decree absolute: viz. paying such costs as he would have paid on showing cause for his default, and submitting to pay subsequent costs. The form merely was taken into consideration, not the merits. The case of *Kinsey v. Kinsey*, there (3) referred

(1) 3 Mer. 698; *Vowles v. Young*, ante, vol. ix. 172.

(2) Amb. 89; 1 Dick. 145.

(3) 1 Dick. 145.

to, had this additional, and very inconvenient, circumstance; the Report had been made under a Decree absolutely confirmed; and the time appointed for redemption having elapsed, the Defendant was absolutely foreclosed: * yet even in such a [* 322] case he was permitted to re-hear on payment of costs.

If the merits are taken into consideration, it will be a severe hardship on this Defendant, a *bona fide* purchaser in 1794, stepping into the place of one, who could not complete his purchase, if he should not be permitted to re-hear this Decree without paying in the farther sum of 1800*l.*; having never yet received any thing. Had he occupied himself, and been fixed with a rent, this might be the just mode of estimating what is due; but he is thus made a constructive trustee for the Charity, charged according to this valuation with the full rent, though he has underlet, as it may appear, much below the value; the under-tenant therefore being properly a party, as a trustee for the Charity. What was paid for the lease, that was surrendered, must be taken into the calculation; which should not have gone farther back than the time of filing the information. The increased rent of 60*l.* might be accounted for by subsequent improvements and other circumstances, which may be the subject of inquiry.

The case of *The Attorney General v. Owen* (1) and *The Attorney General v. Griffith* (2), the information being filed against the immediate representative of the lessee, claiming as a volunteer, cannot govern the case of a purchase for valuable consideration, by auction, at the very town where the property is situated, with the knowledge therefore of all the feoffees. Is it possible in such a case to go beyond the time of filing the information, or perhaps the demand and refusal to surrender?

* In a subsequent case, *The Attorney General v. Griffith*, [* 323] your Lordship said (3), that care must be taken not to press too hard upon those, whose enjoyment has been permitted by the negligence of trustees and the abstinence of persons having beneficial interests; and upon that principle the account was directed only from the time of filing the information or the previous refusal on demand. Upon what principle could this Decree be taken; giving costs, to be paid by Brooke to Bryant, as a mere tenant from year to year, not claiming any interest, swearing he had not cut, or threatened to cut timber, and therefore an unnecessary party?

Sir Samuel Romilly and Mr. Bell, for the Relators.—The only question is as to the terms, upon which this indulgence is to be given. The relators, protesting against the right to a re-hearing, do not resist it upon terms: first, payment of the costs of this application: secondly, the costs of the reference, the propriety of which is now disputed, after the relators had been permitted to incur the expense; thirdly, payment into Court of the sum found due upon the facts

(1) *Ante*, vol. x. 555; *The Attorney General v. Magwood*, *ante*, 315; *The Attorney General v. Wilson*, *post*, 518. See the note, vi. 453.

(2) *Ante*, vol. xiii. 565.

(3) *Ante*, vol. xiii. 579.

stated : which however, the answer being replied to, are not admitted. The consideration for this lease was clearly inadequate. It is upon the Defendants to establish the farther consideration from the surrender of the former lease : which, if very valuable, was equally a breach of trust ; and, if of small value, could not be a consideration for a lease at this enormous under-value. The Defendant, stating, that he has not received rent, does not disclose the reason. The other Defendant was added by amendment upon the answer of Brooke, asserting, that Bryant had an interest as lessee : but [* 324] a mere tenant from year to year, or, as * sometimes occurs, occupying at a weekly rent, is never treated in these cases as a trustee.

The case of *The Attorney General v. Green* (1) was not the first decision, upon a principle too clear to admit any doubt, that, a trustee for Charity, under an obligation to make the most of the land, and thus committing a gross breach of trust, apparent upon the lease itself, the lessee is a trustee from the moment he takes the property upon such terms that he must be aware of the breach of trust. In the late cases of that sort the improvidence consisted in, not the amount of the rent, but the extent of the term, not providing for an increase in the value of land. Though the information has no specific prayer for an account of the rent, in the case of a Charity the Court will give that relief, which the charges warrant (2). As to the costs, your Lordship said in the last of these cases, that the Court would give the costs in future (3). An application for a re-hearing will not without strong circumstances induce the Court to stay the proceedings. The distinction of this case is against the Defendant, asking, as the consequence of his default, what applying for a re-hearing upon the merits he would not be entitled to. He must establish, that this Decree is beyond a doubt grossly erroneous.

The LORD CHANCELLOR [ELDON].—It is perfectly settled, that such an information as this, has quite prayer enough to authorize the direction for an account of the rent. The rule in cases of [* 325] Charity is almost, that the general prayer is * sufficient ; and the Court will give the relief adapted to the case. Supposing the Defendant to have been misled by the omission to ask that account, he could not avail himself of that, when he was to show cause against the Decree.

The object of this application is not to anticipate what the Court will do upon a re-hearing, but to ascertain, upon what terms a re-hearing can be had. The distinction is very material. Suppose, instead of default at the hearing, the Plaintiff taking such Decree as he would stand by, that the cause had been actually heard, and the Defendant had no opportunity of making the Decree absolute, all the argument, now addressed to me, might have been urged against

(1) *Ante*, vol. vi. 452 ; see the note, 453.

(2) *The Attorney General v. Whiteley*, *ante*, vol. xi. 241, and the note, 247.

(3) *Ante*, vol. xi. 581.

the Decree, when it was made, and in that case the power to re-hear would have been of course upon the usual certificate of Counsel. Upon an application to stay the proceedings, the Court must *prima facie* have taken the Decree to be right ; and, had this party permitted the Master to go on to a Report, it would have been very difficult, even upon these weighty considerations, to stay the proceedings, and prevent the person, entitled to the benefit of the Decree, from at least having the fund secured, until that Decree was re-considered. The instant the Report was made, the right to have the money paid into Court attached : but this Defendant's application is not to stay proceedings in the Master's Office, but merely to be put in the same situation as if he had a right to petition, that the cause may be re-heard ; and I do not apprehend, that by giving that leave I stay the proceedings upon this draft of the Report. The Defendant ought not to be in a worse situation than if he had appeared ; but he cannot complain of the account of the rent, having had an opportunity of opposing the confirmation of the Decree ; and permitting it to proceed to a draft of a Report of this sum, as due from him.

* I now repeat, as my judicial opinion, the very general [* 326] proposition I stated in *The Attorney General v. Owen* (1) ; that if a Trustee of a Charity Estate will make a lease for ninety-nine years, it is incumbent on the lessee, taking a term of that duration, to show a consideration making that a proper lease ; as in the ordinary course of a provident management of an estate it is not. It is impossible here to contend, that trustees for a charity can make a lease with covenants for perpetual renewal. Lord Thurlow frequently said, that contract should never have been performed between man and man : but that trustees of a charity estate can part with that estate for ever, for a consideration not shown to be an equivalent for the inheritance, is a proposition generally not to be endured here.

There is considerable doubt, whether the Court ought to direct the inquiry, that has been suggested as to the consideration. Upon the statement in the answer, that the lease was granted in consideration of the surrender of the former lease, the information was amended ; putting directly in issue the question, whether that surrender could form any consideration, the lease being of no value ; and this petition states that no answer was put in to that amended information. As to the sum of 200*l.* paid upon the purchase of this lease, if a person thinks proper to make such a purchase, not from the feoffees, but from a person, who had taken a former lease, and without reference to those feoffees, it would be too much to hold the consideration paid on that purchase as going to the benefit of the Charity, and to be allowed to the purchaser here in a discussion between him and the Charity. How is that consideration, passing to a person, a stranger to the Charity in point of *contract, to [* 327] be charged against the Attorney General in this information?

(1) *Ante*, vol. x. 555.

As to Bryant, the tenant, whom the Defendant to this moment represents as a proper party, complaining, that he alone is charged with the rent for sixteen years, whether it was necessary to make him a party, or whether the allegation of this Defendant, that he never enforced payment of the rent can avail him, is for future consideration : but I cannot permit a re-hearing by special application to stand on better terms than the party under the ordinary right to present such a petition would have had.

The Relators go too far in requiring the Defendant to pay the money into Court at present : but I will not disturb what has been done in the Master's Office. A Motion may be made to have that money paid in ; and then I shall consider the application of those cases, that have been referred to, as to staying the proceedings. The Relators are clearly entitled to the costs of this application, and to the previous costs in the Master's Office ; and reserve the consideration of the future costs in the Master's Office until the Re-hearing.

1. THE Court of Chancery is never disposed to countenance minute objections to the form of pleadings filed in behalf of a charity, when the allowance of such merely technical objections would occasion an unnecessary expenditure of the charity funds : see, *ante*, note 1 to *The Attorney General v. Whiteley*, 11 V. 541.

2. The *onus* of showing a good consideration for a very long lease of charity estates rests with the tenant : see the note to *The Attorney General v. Green*, 6 V. 452, and note 4 to *Taylor v. Stibbert*, 2 V. 437.

3. As to the importance of the rule, that proceedings under a decree should not, in general cases, be stayed even by an appeal to the House of Lords, see note 4 to *The Canons of St. Paul's v. Crickett*, 2 V. 563.

4. A note of the proceedings in the principal case, in an earlier stage of the suit, is given in 3 Meriv. 698, from which we learn, that the first application of the defendant, after the decree taken by default, was rejected, not because it was made by motion instead of petition, but because the defendant sought to have the order for making the decree absolute discharged, and to be allowed a day for showing cause against the decree ; whereas, all he was entitled to was a rehearing upon terms : see the note to *Stubbs v. —*, 10 Ves. 30.

GREGORY v. MIGHELL.

The MASTER of the ROLLS for the LORD CHANCELLOR.

[1811, Nov. 20, 25.]

AGREEMENT for a lease, in part performed by possession taken, though without express assent, acquiesced in, and expenditure permitted: specific performance according to the Plaintiff's evidence against the assertion of a right of resumption by the Answer, and one witness, not proving, that it was admitted (a).

Allegation of the Bill, that the Plaintiff, the tenant, was to pay taxes and do necessary repairs, not proved, is no substantial variance; being an admission against himself, and immaterial from a tenant's legal liability.

THE Bill stated, that in 1799 the Defendant agreed to let to the Plaintiff, and the Plaintiff to take from him, several premises and lands in the neighborhood of Brighton for a term of twenty-one years from the 29th of September, 1799, at a fair and just annual rent, to be fixed and ascertained by two indifferent persons, the one to be chosen by the Plaintiff, the other [by the Defendant, with liberty to the arbitrators in case of their differing to choose one or more umpires; and the taxes of such premises and the necessary repairs of the same during such term were to be borne by the tenant.

The Bill farther stated, that at Christmas, 1799, the Plaintiff entered; and has continued in possession upon the faith, that such lease would be made; has cultivated as tenant for twenty-one years; and been at considerable expense in manuring, &c.; that in part-performance of the agreement he paid the taxes, incurred since his occupation; and in farther pursuance and execution of the agreement the Plaintiff and Defendant proceeded to the choice of arbitrators to appoint the rent; and agreed to enter into bonds of arbitration. The Bill then alleging, that the Defendant refuses to sign arbitration bonds, and the arbitrators refuse to proceed, unless such bonds are signed, prayed a * specific performance of the [* 329] agreement, and an Injunction against an Ejectment.

The Defendant by his answer stated, that the lands, adjacent to Brighton, have of late considerably increased, and are still increasing, in value; and therefore it is the general and almost invariable cus-

(a) The mere possession of land contracted for will not be deemed a part performance, if it be obtained wrongfully by the vendee, or if it be wholly independent of the contract. Thus, if the vendee enter into possession, not under the contract, but in violation of it, as a trespasser, the case is not taken out of the Statute. But if the possession be delivered and obtained solely under the contract; or if, in case of a tenancy, the nature of the holding be different from the original tenancy, as by the payment of a higher rent, or by other unequivocal circumstances, referrible exclusively to the contract; there the possession may take the case out of the statute. 2 Story, Eq. Jur. § 763, and English cases cited.

As to the enforcement of specific performance in cases of part-performance, see *ante*, note (a) *Wills v. Stradling*, 3 V. 378.

There can be no decree upon the evidence of a single witness against the Answer. See *ante*, notes (a) and (c) *East India Co. v. Donald*, 9 V. 275; note (b) *Mortimer v. Orchard*, 2 V. 243.

tom for land-owners in that vicinity, when they grant leases for a term of years, to insert a clause authorizing them at any time during the continuance of such term to take back any part of the lands demised on condition of paying to the tenant the fair value of the crops then growing, and a proper compensation for the ploughings and amendments done thereto or thereon, as is usual in similar cases in that part of the country ; and it was understood, that any lease to be executed should contain a clause to the effect above set forth ; admitting the agreement to enter into bonds of arbitration to fix the rent upon the condition aforesaid ; denying knowledge of the expenditure, &c. ; and insisting upon the Statute of Frauds (1).

The Bill proceeded also upon a paper, as a written agreement ; but, that paper being without date and signature, and the answer insisting, that it was delivered, not as constituting agreement, but merely as a schedule of the premises intended to be let, and to enable the arbitrators to fix the rent, was, as an agreement in writing, abandoned.

Sir *Samuel Romilly* and Mr. *Wear*, for the Plaintiff, relied on the parol agreement, as proved and in part performed.

Mr. *Leach*, and Mr. *Wingfield*, for the Defendant.—It [*330] is not settled, that mere delivery of possession * amounts to a part-performance. The true question is, whether the possession has been so dealt with, that the effect of refusing to proceed is fraud. The possession taken by the Plaintiff, without the Defendant's consent, cannot be considered as taken under the agreement. The agreement proved varies essentially from that stated in the Bill ; which is framed upon an agreement in writing ; and states a term, not noticed by the witness, that the Plaintiff should pay the taxes and do the necessary repairs. The agreement, stated by the Plaintiff's evidence, omitting the clause of resumption, is not the agreement actually entered into by the parties. The case of *Milnes v. Gery* (2) has settled, that this Court will not substitute a person to make the valuation of the property sold instead of the person agreed upon by the parties ; and is a decisive authority, that the Court cannot appoint the arbitrators.

Sir *Samuel Romilly*, in reply, contended, that there was no material variation from the agreement stated in the Bill. The allegation as to the repairs and taxes to be borne by the tenant is merely the expression of that which the law would imply : even tenant from year to year being bound to repair. The Plaintiff's possession can only be referred to the agreement ; and that possession taken under an agreement is part-performance is now settled doctrine.

THE MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The Bill in this cause seeks the specific execution of a parol agreement for a lease for twenty-one years of lands near Brighthelmstone. The

(1) Stat. 29 Char. II. c. 3.

(2) *Ante*, vol. xiv. 400.

Defendant resists the execution upon various grounds : first, that the agreement, stated by the Bill, is not the same as that, deposed to by the Plaintiff's witnesses : secondly, that the agreement deposed to by the Plaintiff's witnesses, is not the agreement really entered into by the parties : thirdly, that, supposing it well proved, there was no part-performance ; as the possession, which it is admitted the Plaintiff has had, was taken without the Defendant's consent ; and therefore is not to be considered as taken under the agreement : lastly, some difficulty is suggested with regard to the mode in which the rent, which was to be fixed by persons chosen by the parties, but which never was so fixed, is now to be ascertained.

As to the first objection, the Bill in stating the agreement adds a term not noticed by the witness, who was present at the making of it ; that the Plaintiff should pay the taxes and do the necessary repairs ; and it is contended, that this is a substantial variation from the agreement stated and proved : but when it is considered, that this is an admission by the Plaintiff against himself of an obligation beyond what this witness proves him to have undertaken, and secondly, that it is immaterial, whether that term was, or was not, expressed, as the tenant must without any stipulation pay taxes and do necessary repairs, I do not think, that the agreement stated is by this addition substantially different from that proved. The other variations insisted on are merely verbal ; not affecting in the slightest degree the sense or substance of the contract.

It was then said, that the agreement the Defendant entered into was, not for an absolute lease for twenty-one years, but with liberty to him to resume the whole or any part of the land, at any period, when he should think proper. The question upon that is, whether the evidence for the Plaintiff is sufficient to prevail against the * Defendant's oath ; which was supposed to receive [* 332] some confirmation from the evidence of Wood : who says, that some days after the agreement the Defendant informed him in the presence of the Plaintiff and Philcox, that the Defendant had reserved to himself the right to sell any part of the land, at any time, on making a deduction from the rent, or to that effect : but there the witness stops : he does not say, what was the demeanor of the Plaintiff ; whether he assented to this statement or contradicted it ; or was silent. The declaration of a party is no evidence for himself, except so far as it is acquiesced in by the other party ; and for any thing that appears this declaration may have been met by a direct contradiction. There is therefore no confirmation of the answer from such testimony. Against the answer upon this point there is the evidence of Gregory, the witness who was present when the agreement was made : who says, he was called upon to notice the terms of it ; and he positively swears, that it was not in any manner understood, expressed or agreed, that the Defendant was to be at liberty to take back or resume any part of the lands upon any terms. Philcox says, the Defendant informed him

and Wood, that he had let the premises for twenty-one years to the Plaintiff: and did not inform them of any clause for his resuming any part of the land for building, or for any other purpose. There is farther what appears to me an extremely strong piece of evidence against the Defendant upon this: namely, a paper, which it is admitted, he drew out to serve as a memorandum to the valuers in ascertaining the rent. In that paper he states the agreement to have been for a lease for twenty-one years; and does not say any thing of a resumption in any case, or upon any terms. If the agreement had really been that the lease should be determinable at his pleasure, that was full as important a circumstance for communication to the valuers * as the mere possible duration of the lease for twenty-one years, if he should permit it; as it cannot be supposed, that the same rent would be set upon a lease at will and a lease for twenty-one years absolute. I think therefore, that the evidence for the Plaintiff greatly outweighs the assertion of at different agreement in the answer.

It is said, however, that the possession was taken without the Defendant's consent; and consequently is not to be considered as a possession under the agreement. The Plaintiff had no other title to possess the land; and therefore his possession is *prima facie* to be referred to the agreement. As to the Defendant's allegation, that it was without consent, besides that it seems to be disproved by Gregory and Philcox, I do not conceive, that the Defendant is now at liberty to say, it was a possession, that had no reference to the agreement; as he permitted the Plaintiff to remain in possession, and to make expenditure upon the land for eight years, before he brought an ejectment. He must have known, that the expenditure was made upon the faith of the agreement; and I cannot now permit him to turn round, and say, the Plaintiff has been possessing merely as a trespasser; as he must be, if his possession is not to be referred to the agreement. The non-payment of rent is accounted for by the circumstance, that the rent was not fixed in the manner stipulated by the agreement. After it was known, that the arbitrators had not fixed any rent, and that none of the other means, provided by the agreement, were resorted to, the Defendant still acquiesced in the Plaintiff's retaining possession of these lands. That is a case in which the failure of the arbitrators to fix the rent can never affect the agreement. It is in part performed; and the Court must find some means of completing its execution; as I [* 334] have already said, the Plaintiff is not to be * considered as a trespasser. Some rent he must pay: the amount must be fixed in some other mode; and it seems to me, that it should be ascertained by the Master, without sending it to another arbitration; which might possibly end in the same way.

A specific execution of this agreement must therefore be decreed: the Master to ascertain, what in 1799 would have been the fair rent of these premises upon a lease for twenty-one years from that year;

and I do not see, how I can exempt the Defendant from the payment of the costs (1).

1. An agreement, though reduced into writing, cannot be enforced, if it do not embody all the *material* terms, or, at least, unless it refer distinctly to some other mode by which they can be unequivocally ascertained: see, *ante*, note 1 to *Calverly v. Williams*, 1 V. 210, and note 2 to *Brodie v. St. Paul*, 1 V. 326. And the cases in which particular subordinate parts of an agreement have been allowed to be modified, and the agreement then enforced, have been declared rather to stand in need of defence for the length they have gone, than to justify any farther extension of that doctrine: see note 1 to *Calcraft v. Roebuck*, 1 V. 221.

2. The testimony of a single witness may prevail against the defendant's answer, when the evidence given by the witness is supported by collateral circumstances; see note 2 to *Mortimer v. Orchard*, 2 V. 243.

3. Wrongful possession will never be imputed, when it is capable of being referred to an equitable title agreement: see the concluding passage of note 2 to *Selby v. Alston*, 3 V. 339; thus, where a person, after having contracted for the purchase of an estate, enters into possession, he is not to be deemed a trespasser, but his entry, if the consent of the vendor can be implied, though it may not have been expressly given, must be referred to the contract, of which, therefore, it is always held a part-performance, taking the case out of the Statute of Frauds: see note 1 to *Wills v. Stradling*, 3 V. 378. And, when the owner of an estate has stood by, and, even tacitly, encouraged the occupier to engage in expenditure thereon, a court of equity will be disposed to presume every thing necessary to support the reasonable claims of the occupier: see note 2 to *Dann v. Spurrier*, 7 V. 231. On the other hand, a purchaser who takes possession of an estate he has contracted for, before the title is cleared, may place himself in an awkward situation as to his costs, and even as to his right of examining the title: see note 2 to *Calcraft v. Roebuck*, 1 V. 221.

(1) See *ante*, vol. iii. 38, 9, 40, the note to *Pym v. Blackburn*.

SAVAGE v. BROCKSOPP.
BROCKSOPP v. LUCAS.

[1811, Nov. 28.]

SPECIFIC performance; the lapse of time being trifling, and the result of fraud (a). The relief by delivering up a contract requires a stronger case than to resist a specific performance (b).

A single witness cannot prevail against the Answer, unless confirmed by circumstances (c).

Answer read as evidence, contrasted with the other evidence, not for the purpose of discrediting it.

Evidence of conversation over-heard by a witness, placing himself behind wainscot, &c. received with great caution.

Distinction at Law and in Equity as to reading the Answer. At Law the whole must be read (d), [p. 336.]

THESE suits were instituted under the following circumstances.

After an agreement in writing, that Brocksopp should take an assignment of Lucas's interest, the remainder of a term of about fifty-six years, in a public-house at Islington, and should grant a lease for twenty-one years to Savage, the two latter formed a plan to get rid of Brocksopp, and deal together; and with this view they appointed a meeting for executing the deeds on the 29th of [* 336] September, from which time the new interests were * to commence, at Islington, at ten o'clock at night. Brock-sopp attended; but without his money; expecting to receive the money from Savage; and found the other parties, each attended by his attorney, and the clerk of a brew-house. Lucas's attorney objected to the execution of the assignment to Brocksopp; as he had not brought his money; and, as it was too late to send for it, though he offered to pay it the next morning, the contract was declared to be at an end.

(a) Time is not generally deemed in Equity to be of the essence of the contract unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. 2 Story, Eq. Jur. § 776.

As to the materiality of time, see *ante*, note (a) *Hertford v. Bourne*, 5 V. 719; notes (b) and (c) *Omerod v. Hardman*, 5 V. 722; note (a) *Harrington v. Wheeler*, 4 V. 686.

(b) A Court of Equity will sometimes refuse to decree a specific performance of an agreement, which it will yet decline to order to be delivered up, cancelled or rescinded. 2 Story, Eq. Jur. § 693.

(c) There can be no decree upon the evidence of a single witness against the Answer. See *ante*, notes (a) and (c) *East India Co. v. Daniel*, 9 V. 275; note (b) *Mortimer v. Orchard*, 2 V. 243; 2 Story, Eq. Jur. § 1528.

(d) Where the answer is offered as the admission of the party against whom it is read, it seems reasonable, that the whole answer should be read to the jury, for the purpose of showing under what impressions that admission was made, though some parts of it be only stated upon hearsay and belief. And what may or may not be read, as the context of the admission, depends not upon the grammatical structure, but upon the sense and connexion in fact. But whether the party, against whom the answer is read, is entitled to have such parts of it as are not expressly sworn to, left to the jury as evidence, however slight, of any fact, does not yet appear to have been expressly decided. 1 Greenleaf, Evid., § 202; *Roe v. Fetrus*, 2 Bos. & P. 548; *Gresley*, Evid. 13.

The object of the bill in the first cause was to have the agreement delivered up; representing Brocksopp as a trustee in this transaction for Savage, upon the evidence of a single witness to the effect of conversations, overheard through a partition, opposed to the positive statement of the answer, the terms of the agreement, and the circumstances, that occurred at the meeting on the 29th of September.

The Bill in the other cause prayed a specific performance.

Mr. *Leach*, for Savage; Mr. *Cooke*, for Lucas; Sir *Samuel Romilly* and Mr. *Bell*, for Brocksopp.

The LORD CHANCELLOR [ELDON].—I must take this opportunity of repeating some observations upon the points of evidence that occur in these causes. At law, it is true, if an answer is proposed to be read as evidence, the whole answer must be read; though there were declarations of Judges, first, I think, by Lord Mansfield, that there is no reason for reading the whole; and it has often occurred to me to consider, whether in directing issues this Court should not attend more to its own rules of evidence, by which the effect of the depositions is contrasted with the answer, read [* 337] for the Plaintiff; whether the practice of sending issues of fact to Courts of Law, proceeding by a rule perfectly different, without any direction upon that head, is quite wholesome (1).

It has often been contended by me among others, but never effectually contended, that, as on the trial of an issue or an action the answer can be so treated at law, this Court, if it has to determine upon facts without sending the case to law, will depart from its own rules as to what is, or is not, to be attended to in contrasting the evidence with the answer, read for the Plaintiff; and great delicacy has always prevailed in permitting an answer to be read for the purpose of showing by argument, that it is not to be believed. The answer can be read only as evidence for the purpose of being contrasted with the evidence of one or more witnesses; as I consider this answer read to contrast it with the evidence of this single witness; and I doubt whether it is possible to permit a party to read the answer, as that on which he relies, not because he believes, but because he discredits it. That is not the usual course of proceeding.

This answer is met by one witness: whose testimony is not only shaken by the circumstances, that occurred at the meeting upon the 29th of September, but is in direct opposition to the written agreement, sought to be enforced. Bound to construe the answer by the rules of this Court, I must consider the Defendant Brocksopp as stating, that, though contracting for the ability to grant a lease for twenty-one years, he was not contracting for the whole interest Lucas had for Savage's benefit.

It is not however to be put entirely upon the answer, though that is the effect of it. The contract must in a considerable

(1) 5 Mod. 9, 10; Gilb. Ev. 51; 3 Salk. 153; 1 Sid. 418.

degree speak for itself. The intention of Brocksopp in taking the whole interest was to unite the lease to the reversion in himself; and this contract with Savage is expressly for a lease for twenty-one years repeated more than once, with the exception of a particular piece of ground. There is no rational doubt, that Savage knew what he was about, and understood it. He must perform his agreement; unless there are circumstances upon which he can resist a specific performance; or, farther, which it is unnecessary to observe would require more, to insist on having the contract delivered up, so as to prevent an action upon it (1).

It is not easy to understand this; but it seems that the lease was vested in Lucas for fifty-six years in Equity; and, to make out the case in the first cause, it must be contended, that Brocksopp was to be considered a trustee throughout for Savage, against the positive oath of the Defendant, and upon the evidence of this witness, contrasted with the evidence of the written contract. Without much attention to the circumstances of Nash's evidence, the Defendant must have the benefit of the rule (2), that the effect of his answer is not to be cut down by the testimony of a single witness, unless corroborated and confirmed by circumstances bearing down that rule. The lapse of time is nothing. Brocksopp is therefore not to be deprived of the rights resulting out of an agreement in writing, entered into deliberately, upon the evidence of an individual, contradicting the effect of what is introduced into the written contract, and solemnly sworn.

It is however fair to observe upon this evidence, that it is not easy to understand what the witness means should be believed [* 339] by the Court as the effect of these * conversations; and that the evidence of a person, placing himself behind wainscot or tapestry, and stating the effect of conversation there overheard, should be received with great caution (3). This evidence is also in direct opposition to what passed at the meeting on the 29th of September; when, it is clear upon the circumstances, the assignment would have been executed, had Brocksopp brought the money; his name being in the deed, and also in the receipt; and Lucas stating

(1) *Cadman v. Horner*, ante, 10, and the note, p. 12.

(2) *Cooke v. Clayworth*, ante, 12, and the references, page 17, note; and the note, vol. ii. 244.

(3) Such evidence was received in a criminal case, upon the trial of *Holloway* and *Haggerty* in 1807, for the murder of Mr. Steele; and that instance shows the danger of relying on words, received through a partition, and probably in a lateral direction. After the examination of an accomplice before the magistrate, stating the transaction, which occurred four years before, the prisoners were confined in separate, contiguous, apartments; and an officer was placed in another to overhear their conversation. One of the prisoners said, speaking of the evidence, that had been given, "He said we had the gin at ——" (a public house in St. Giles's). The answer was, "We must have had the gin there."

The whole effect of this answer, as applying directly to the particular transaction and period of time, depends upon the article. Omitting it, the utmost is a strained inference, that the first observation acknowledges the fact, stated by the witness; and that the second admits, not merely their general habit of drinking at that place, but by reference the particular instance mentioned.

distinctly, that he should have executed, had the money been ready.

The conclusion is, that Savage not only has not established his right in this Court to have the agreement delivered up, but has not repelled the right to a specific performance. His Bill must therefore be dismissed with costs; and in the other cause a specific performance must be decreed with costs against both the Defendants.

1. THE evidence of a single witness will prevail against the defendant's answer only when the evidence of the witness is corroborated by collateral circumstances: see, *ante*, note 2 to *Mortimer v. Orchard*, 2 V. 243.

2. Unless time has been made of the very essence of a contract, the legal consequences of a deviation as to this point will be relieved against in equity, if it appear that full compensation can be given, and the *laches* has not been fraudulent or wilful: see, *ante*, note 2 to *Eaton v. Lyon*, 3 V. 690; and the note to *Aston v. Boore*, 5 V. 719. In the principal case, the lapse of time was not only trifling, but that trifling delay was occasioned by the artifice of two of the parties, who, of course, were not allowed to take advantage of their own wrong.

3. In proper cases it is, no doubt, competent to a court of equity to decree that a purchase contract shall be delivered up: see note 7 to *Cooper v. Denne* 1 V. 565. But there are many cases in which the court will neither execute a contract, nor order it to be delivered up, but leave both parties to make what they can of it at common law: *Turner v. Harvey*, 1 Jacob's Rep. 178; *Mortlock v. Buller*, 10 Ves. 305; *Ord v. Noel*, 5 Mad. 441; and there are also cases in which the court will not disturb an agreement that has been executed, though it would have refused to carry such an agreement into execution: *Willan v. Willan*, 16 Ves. 83; *Legge v. Croker*, 1 Ball. & Beat. 516; *Cadman v. Horner*, 18 Ves. 12.

JOSEPH, *Ex parte* (1).

[* 340]

[1811, Nov. 28.]

PETITION to stay a Bankrupt's Certificate upon allegation of concealment, sworn to only upon information and belief, dismissed with Costs.

Effect of Stat. 49 Geo. III. c. 121, s. 14. A creditor going in under a Commission of Bankruptcy for the purpose of relief, waived his personal remedy, [p. 341.]

Distinction as to signing Bankrupt's Certificate; depending on the caprice of the creditors: but, if no wilful concealment, the Commissioners are bound to sign, and the Lord Chancellor to allow, without regard to conduct previous to the Bankruptcy, [p. 342.]

Preference in contemplation of Bankruptcy, however moral the Act, void, [p. 342.]

THIS Petition prayed, that the certificate of a bankrupt should be stayed upon the allegation of wilful concealment of various particulars, and to a large amount. The petitioner, who had not gone in under the Commission, held the bankrupt in execution; and his affidavit in support of the petition went merely to information and belief; all the charges being denied or explained by the affidavit of the bankrupt.

Mr. Hart, Mr. Agar, and Mr. Montague, in support of the Petition; Sir Samuel Romilly and Mr. Bell, for the Bankrupt.

The Lord CHANCELLOR [ELDON].—I have had repeated occasion to consider, whether the certificate of a bankrupt should be withheld upon the allegation of concealment of part of the effects; and I always thought, that great attention was due, when a fact so highly criminal was imputed. If the wilful concealment could be made the subject of contest upon the trial of a civil issue, or in a more solemn mode by a criminal proceeding, it is said, and probably with truth, that by allowing the certificate, I should in some degree influence the mind of the Jury, or, if the proceeding had gone beyond that stage, of the Judge, trying the fact of wilful concealment upon an indictment. On the other hand, however, my act, with-
[* 341] holding the certificate, where the * fact of wilful concealment is doubtful, may have an influence against the bankrupt in the form of trial most formidable and penal to him. As to putting this in a course of trial on a civil issue, when a clear case of concealment is brought before me, I am bound to act upon it; but, if there is any doubt, by refusing the certificate I act upon a doubtful case. If I merely withhold it, the creditor has more ways of proceeding; and should he succeed in establishing this objection to the certificate, I cannot give it validity.

I make no observation upon the act of the petitioner, taking the bankrupt in execution, while the petition was depending; but, if by taking a course directly adverse to the proceedings under the Commission the petitioner has placed himself under such circumstances, that he cannot have the validity of the certificate examined in a civil proceeding, that situation is the effect of his own choice; the Law (1) having now most properly, as I think, established, that a creditor shall not come in under the Commission, for the purpose of relief at least, unless he waives his personal remedy against the bankrupt.

Whatever might be the result, had one half of these allegations been proved, a charge, imputing so much upon information and belief, is nothing; and, though the inconvenience to justice by disclosing the names of those, from whom the information comes, may be considerable, I must act so as to produce the least public inconvenience; and cannot set that, which may follow such disclosure, against the plain mischief of examining the right to the certificate, involving the imputation of a capital offence, upon rules of evidence not acknowledged by the Law.

[* 342] * I have frequently observed, and the Law upon that is clear, that it does not belong to the Lord Chancellor to look into the moral life of the bankrupt, and the nature and quality of his acts, before he became a bankrupt: but the Law has left entirely to the caprice of his creditors to sign his certificate, or not; under a high moral obligation perhaps, but no legal obligation, however great his atonement. That is not so as to the Commissioners.

(1) Statute 49 Geo. III. c. 121, s. 14, repealed; but re-enacted by Stat. 6 Geo. IV. c. 16, s. 59.

If in the administration of his affairs, while a bankrupt, he has acted as a bankrupt ought to act, the Commissioners are bound to certify (1) ; and the Lord Chancellor, if he does not afterwards discover wilful concealment with reference to the bankrupt's conduct, while a bankrupt, is bound not to withhold the certificate. I have had frequent occasion to lament the consequence, where men, entrusted by women indiscreetly with their whole property, their sole provision, have misapplied it under assurances to the proprietors, that it was kept in that state, which was the object of their confidence ; yet such a case, though an Act of Parliament was once prepared to make it a capital felony, has not been held a sufficient ground for withholding the certificate.

Upon the subject of preference in *Harnan v. Fisher* (2) the Court felt, as Lord Mansfield expressed, a necessity so to decide, that is, a legal necessity ; the act being as moral an act as could be ; and as to the necessity, though the Law upon that head and contemplation of bankruptcy is now well settled, the ablest lawyers have said there is no such necessity, and it was never heard of before. In this case however a preference is out of the question.

As to the alleged concealment of cordage, which, it is said, the bankrupt bought at 90*l.* and sold at 50*l.*, if he concealed, that he was again, either in partnership, or as a *sole [* 343] trader, to have himself the benefit of this sort of distribution of that cordage, that would be evidence of concealment : but, if it is no more than buying in the partnership at 90*l.* and selling at 50*l.*, unless by the sale under this bankruptcy of all his interest in the joint and separate estate, it can be supposed that there is to be some residue for him afterwards, whatever may have been the impropriety of his conduct, wilful concealment is not established.

With regard to the furniture, no other creditor, who has gone in under the Commission, and has either signed, or is contending against, the certificate, will upon the ground of concealment of effects support this creditor, who has not gone in under the Commission, but has taken the bankrupt in execution. There is not one of the other creditors, who states, that he has reason to be dissatisfied with this disclosure, or expresses surprise at the small quantity of the furniture. That therefore affords no ground.

The last article is the ship *Eliza* ; and upon that wilful concealment is inferred, as necessarily flowing from the fact, that the ship was conveyed to Hodgkinson ; but, why am I to infer that from the mere suggestion of this petitioner, that he believes it, not stating any ground for that belief ; when the circumstance, that the bankrupt had dealings with Hodgkinson, has been before the creditors in general, and the accounts as to that partnership are hereafter to be set-

(1) The general words therefore of the Stat. 5 Geo. II. c. 30, s. 10, that there doth not appear "*any reason to doubt*" of the truth of such discovery, &c. were construed as confined to his conduct during the bankruptcy. The error in the latter part of the clause, "or that the same is *not* a full discovery," is corrected in the Stat. 6 Geo. IV. c. 16, s. 122.

(2) Cowp. 117.

tled ; on the result of which it must depend, whether this bankrupt advanced a part, large or small, of the capital ?

The conclusion is, that this Petition must be dismissed ; and, imputing so much as it does, with costs. I shall not stay the certificate ; but give liberty under the other petition to go in and prove the debt.

1. This case is likewise reported in 1 Rose, 184.

2. As to the reluctance of the court even to stay, and, *a fortiori*, to recal a bankrupt's certificate upon grounds which appear questionable, see, *ante*, the note to *Ex parte Heath*, 6 V. 613; the note to *Ex parte Mawson*, 6 V. 614; and note 3 to *Ex parte Hall*, 17 V. 62.

3. By the 59th section of the statute of 6 Geo. IV., c. 16, it is enacted, that no creditor who has brought any action or suit against any bankrupt, in respect of any demand which might have been proved as a debt under the commission against the bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings, without relinquishing such action or suit: and, in case the bankrupt shall be in prison or custody at the suit of the creditor, before the latter can prove or claim as aforesaid, he must give an authority in writing for the discharge of the bankrupt: and the proving or claiming a debt under a commission shall be deemed an election to take the benefit of such commission with respect to the debt so proved. In the construction of the 14th section of the statute of 49 Geo. III., c. 121, upon which the enactment above stated is founded, the decisions of Lord Eldon, in *Ex parte Dickson*, 1 Rose, 98, and in *Ex parte Hardenburgh*, 1 Rose, 204, do not seem to be in accordance with the judgments delivered by the Court of King's Bench in *Watson v. Meder*, 1 Barn. & Ald. 122, and in *Harley v. Greenwood*, 5 Barn. & Ald. 102; the last-named court being of opinion that a creditor who has two distinct demands against a bankrupt, may take the benefit of the commission against him in respect of one demand, and proceed at law in respect of the other. In *Ex parte Glover*, 1 Glyn & Jameson, 270, Sir John Leach, V. C., held, that proof or claim under a commission operates as a relinquishment of any action previously brought, but does not prevent the creditor from bringing an action subsequently for a distinct demand: but, his Honor intimated, the demand sought to be recovered at law should be distinct from that proved under the commission in its nature; to make his meaning more clear, he adduced the instances of bond-debts, and claims of *indebitatus assumpsit*. See the question stated and examined rather more at length in 2 Hovenden on Frauds, 455-457.

4. A bankrupt's right to his certificate can never depend upon the way in which he conducted himself, antecedently to his bankruptcy: *Ex parte Gardner*, 1 Ves. & Beat. 47.

5. Under the 130th section of the 6th Geo. IV., c. 16, a bankrupt forfeits his claim to a certificate by concealment of property to the amount of ten pounds, and, if the certificate has been granted, it may be avoided; but, in judicial construction, this penalty is held to refer only to concealment not detected at the time of signing the certificate: for, if the commissioners, with a full knowledge of the fact, have thought fit, upon a proper atonement being made, to sign the certificate, the court would, probably, not be disposed to accede to a petition praying that such certificate might be stayed: *Ex parte Bryant*, 1 Glyn & Jameson, 206: though it must depend upon circumstances whether the bankrupt would be entitled to his costs incurred in consequence of such a petition: *Ex parte Stevens*, Buck. 389; *Ex parte Enderby*, 5 Mad. 76. It does not necessarily follow that, because the commissioners have been satisfied, the holder of the great seal should be equally so: see the note to *Ex parte King*, 11 V. 417.

6. As to the distinction between a voluntary payment to a particular creditor, by a debtor who knows himself to be on the eve of bankruptcy, and a payment made, not with a view to give a preference, but to escape the pressing importunity of the creditor, see the note to *Ex parte Scudamore*, 3 V. 85.

7. Whether a certificate, though actually allowed by the Lord Chancellor, is not vacated by acts alleged to have been committed against the express enactments of the bankrupt code, is a question properly cognisable at law: *Hughes v. Morley*, 1 Barn. & Ald. 26.

CORDER v. MORGAN.

[ROLLS.—1811, Nov. 30.]

SPECIFIC performance against a purchaser under a Power of Sale in a mortgage deed (a) without the mortgagor, though under a covenant to the mortgagee to join in a sale, without costs; the only authority produced not being in print.

By indentures, dated the 8th of February, 1804, William Restorick conveyed to the Plaintiff, his heirs and assigns, subject to the mortgage to Thomas Beed for 500*l.*, and also subject to redemption on payment of the sum of 500*l.* due to the Plaintiff, with interest, on the 8th of June next, and of such other sums as should before redemption of the premises become due to the Plaintiff from Restorick, for money advanced or paid by the Plaintiff, &c. and it was declared, that in case default should be made by Restorick in payment of the said sum of 500*l.*, then actually due, or such sums as should after become due from him to the Plaintiff, or interest, by fourteen days after payment required, it should be lawful for the Plaintiff, and he was thereby expressly required of his own proper authority, and without any farther authority or direction from the said William Restorick, his heirs, executors, administrators, or assigns, to make sale and dispose of the said hereditaments and premises thereby released, and every part thereof, either absolutely or conditionally, and by way of mortgage; or to demise and lease the same, or any part or parts thereof, for any term or number of years, at such rents or rent as he should think proper; such sale or sales to be either together or in parcels, by public auction or private contract, for the best price that could or might be reasonably had for the same; and such mortgage or mortgages, lease or leases, to be made of the whole or any part thereof to any person or persons who should be willing to purchase the same, or to take a mortgage or mortgages, lease or leases, thereof; who, having paid his, her, or their purchase, mortgage, * premium, or other consideration money [* 345] or moneys, and having obtained a receipt or receipts for the same from the Plaintiff, his heirs, executors, or administrators, should be by such receipt or receipts freely and absolutely discharged from such purchase-money, &c. and such purchaser, mortgagee, lessee, &c. should not be obliged to see to the application, or be answerable for the misapplication or non-application of the money; and the money arising by the sale should be applied first to the expenses of the sale, next to the mortgage to Beed, unless the sale should be subject to that mortgage; and after payment thereof,

(a) Although Lord Eldon at first intimated an opinion unfavorable to a power of sale in a mortgage deed, as dangerous, it is now fairly established. 2 Story, Eq. Jur. § 1027; 4 Kent, Com. (5th ed.) 146, 147, and note; 1 Powell, Mort. 9, 13, Coventry's note K. and Rand's note (1); *Doolittle v. Lewis*, 7 Johns. Ch. 35; 1 Maddock, Ch. Pr. 514; *Bergen v. Bennett*, 1 Caine's Cas. 1; *Jackson v. Henry*, 10 Johns. 185.

or subject thereto, in payment of the Plaintiff; and then the residue of the moneys so to arise are to be paid to the said William Restorick, his executors, administrators, or assigns; and it was covenanted and agreed, that in case the said hereditaments and premises should be sold, he the said William Restorick; his heirs or assigns, would join in such sale, and execute the several conveyances of the premises to be sold to the use of the purchaser, his heirs or assigns: nevertheless it was declared that the joining of the said William Restorick, his heirs or assigns, in any such sale, should not in any wise be deemed essential or necessary to perfect the title of the purchaser or purchasers; the same being intended for the farther satisfaction of such purchaser or purchasers.

The Plaintiff took an assignment of Beed's mortgage; and, having given the proper notice, agreed to sell the premises to the Defendant for 945*l.*; and the Bill prayed a specific performance of that agreement.

The Defendant by his answer submitted, that the Plaintiff was bound to procure Restorick and the assignees under a Commission of Bankruptcy against him to join in the conveyance; as the Plaintiff undertook to make out a proper title to the premises by [* 346] good conveyances and *assurances in Law, to convey a good and indefeasible estate of inheritance in fee-simple.

Sir *Samuel Romilly* (1) and Mr. *Spranger*, for the Plaintiff, contended that this title is under the power of sale in the mortgage deed perfectly free from objection; and the case of *Clay v. Sharp* (2) was produced from the Register's Book.

Mr. *Joseph Martin*, for the Defendant.—The undertaking of the mortgagor in the mortgage deed, that he will for the far- [* 347] ther satisfaction of the purchaser join in the sale, authorised by that deed, entitles the Defendant to have him a party to the conveyance. In *Croft v. Powell* (3), it is said, upon a case similar to this, that a purchaser would insist upon the mortga-

(1) The arguments and judgment *ex relatione*.

(2) *Clay v. Sharpe*, in Chancery, March, 1802, Reg. Book, A. fol. 66.

Upon a mortgage in 1798, to a trustee of leasehold property, held for the remainder of a term of twenty-one years, it was agreed that, if default should be made in payment of the money, the trustee might sell the mortgaged premises, discharge the money due upon the mortgage, and pay the residue to the mortgagor; who covenanted, that in case of a sale he would join in executing an assignment to the purchaser; but that such joining in the execution of the assignment should not be considered as essential to perfect the title, being intended only as a farther satisfaction to the purchaser.

Default being made in payment of the money, the trustee sold by public auction. The purchaser insisted on the concurrence of the mortgagor; and on his refusal to join filed a Bill against the trustee and the mortgagor; and, upon the bankruptcy of the latter, a supplemental Bill against the assignees under his Commission. The mortgagor by his answer stated, that he resisted the sale, as made without his consent, and at an under-value.

The Lord Chancellor dismissed the Bill against the mortgagor with costs; and decreed the agreement to be carried into execution on payment of the residue of the money.

(3) Com. 603; see 608.

gor's joining in the conveyance; and in *The King v. The Inhabitants of Edington* (1), Lord Kenyon intimates that a Court of Equity would control a power, given to a mortgagee to sell the mortgaged premises.

Sir *Samuel Romilly*, in reply, suggested, that something material was probably omitted in the note of Lord Kenyon's observation, taken by a gentleman not practising in Courts of Equity; and distinguished *Croft v. Powell*; where the power of sale was by a defeasance.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT] said, that, when the cause was opened he was unable to suggest any principle, on which the Defendant could properly insist on the mortgagor's being a party to the conveyance. His opinion was, that the clause in the mortgage deed, relied on for the Defendant, empowering the Plaintiff to sell, whereby the mortgagor undertook to join in the conveyance, was a mere contract between the mortgagor and mortgagee; to the benefit of which the Defendant, as a purchaser, was not entitled: and there was nothing in the nature of the contract between the Plaintiff and his mortgagor, which prevented the latter giving, and the former exercising, such a power of sale of the premises as that, upon which this question arose. The case of *Clay v. Sharpe*, cited by Sir *Samuel Romilly*, is an authority precisely applicable to this case.

A specific performance * was decreed according to the [* 348] prayer of the Bill: but the Master of the Rolls said, he did not think it a case for costs; as the case of *Clay v. Sharp* was not in print.

THE risk whether a mortgage title is redeemable or not, rests with the purchaser. It is not sufficient for him to say he thought it irredeemable; if he be wrong in that supposition, his erroneous judgment will not avail him, and supply the want of title: but the equity of redemption will still remain in the mortgagor: *Hansard v. Hardy*, 18 Ves. 462. And where a power of sale is not (as it was in the principal case) incorporated in the mortgage deed, but only appears in a separate instrument of defeasance, there, it seems, a purchaser under that power would have a right to insist that the mortgagor should be a party to his conveyance: *Croft v. Powell*, Comyns, 608.

(1) 1 East, 288, see 294.

MENCE v. MENCE.

[1811, Dec. 3, 5.]

RESIDUARY bequest cancelled by striking through with a pencil all the disposing part, leaving only the general description, with notes in pencil in the margin, indicating alteration (a), and a different disposition of certain articles; a resulting trust for the next of kin (b).

GEORGE MENCE, by his Will, dated the 2d of March, 1804, gave to "John Leslie Newark, now residing in Suffolk Street, Charing Cross, commonly called Lord Newark, the sum of 4000*l.* legacy," in trust, to place out the same on government or real securities for the testator's natural son H. and to pay or transfer the same to him upon his attaining the age of twenty-one years; but, if he shall die under that age, then to his natural son M. upon his attaining that age; and if both his natural sons die under that age, then to his nephew and niece, George Charles and Maria Mence. The testator also gave to the same trustee the sum of 2000*l.* upon similar trusts, for the same persons, transposing the natural sons; and after legacies to his nephew and niece, and others, and some annuities, made a residuary disposition, beginning in the following manner:

"And as to all my ready money, securities for money, stocks in the public funds, goods, chattels, personal estate, and effects whatsoever, and wheresoever, not hereinbefore specifically or otherwise disposed of, I give and bequeath the same unto the said [* 349] John Leslie Newark, his * executors, &c." in trust, to pay his debts, legacies, and annuities, and to invest the residue upon trusts for his natural sons, and his nephew and niece; giving power to apply part of the legacies of the natural sons and nephew for their advancement.

The testator then gave to Lord Newark all the real estates, vested in him by way of mortgage, for the purposes of his Will, and all real estates vested in him upon any trust; and appointed Lord Newark executor "of this my will," and guardian of his two natural sons.

The testator died suddenly at Worthing; and the Will was found in his portmanteau there, with various marginal notes, some import-

(a) A Will or Codicil, or any part thereof, may be made or altered in pencil as well as in ink. 1 Williams, Exec. 63, 81, 82; *Rymes v. Clarkson*, 1 Phillim. 35; *Green v. Skipworth*, 1 Phillim. 53; *Dickenson v. Dickenson*, 2 Phillim. 173; in the goods of *Dyer*, 1 Hagg. 219. It has been laid down in two late cases in the Prerogative Court, that the general presumption and probability are, that where alterations in pencil only are made, they are deliberative; where in ink, they are final and absolute. *Hawkes v. Hawkes*, 1 Hagg. 322; *Edwards v. Astley*, 1 Hagg. 490; see also *Ravenscroft v. Hunter*, 2 Hagg. 68.

(b) This brings up again the constantly recurring question in these Reports, as to the rights of the executor in an unbequeathed residue. In most if not all of the States, such a residue goes to the next of kin. See *ante*, note (a) *Nisbett v. Murray*, 5 V. 158; note (a) *Nourse v. Finch*, 1 V. 344. And the same principle has been adopted in England by the Statute William IV. cap. 40; 2 Williams, Exec. 1050.

ing revocations and alterations of particular bequests, all done with a pencil. A line was drawn under the passage in the beginning of the Will, "John Leslie Newark, &c. commonly called Lord Newark," and immediately afterwards the words "sum of 4000*l.*;" and against that passage he had written, "my wife Jane and Mr. F. R. C. of, &c. to be my executrix and executor." He had also drawn a line through all the residuary bequest, with the exception of these words, beginning the clause —

"And as to all my ready money, securities for money, stocks in the public funds, goods, chattels, personal estate, and effects whatsoever, and —"

Against the residuary bequest he wrote, "This is to be particularly noted," giving as the reason, that he meant to make a different disposition of some portraits and other specific articles; and against the power to apply part of the legacies of the natural sons and nephew for their advancement, "This should be modified."

* The testator, who was a widower at the date of his [* 350] Will, married afterwards. At his death he left his widow surviving, and a sister, Elizabeth Arbuthnot, and a nephew and niece, his next of kin; there being no legitimate issue.

The bill, filed by the two natural sons, against the acting executor and executrix, Lord Newark having renounced, and against the next of kin, praying an account of the personal estate &c. the legacies of 4000*l.* and 2000*l.*; and a declaration, that the Plaintiffs are entitled to the residue; insisting, that the residuary bequest was not revoked as to them; and that by the exception of the pictures, &c. and the other observation in the margin, the testator showed that he did not intend wholly to revoke it.

The MASTER OF THE ROLLS [SIR WILLIAM GRANT] declared the cancellation of the residuary bequest complete by striking out the disposing part; that such cancellation was as effectual as express revocation; and it would have been sufficient, if only the names of the legatees had been struck out.

The question then arose, whether the executors were trustees of the residue for the next of kin; which being considered new, and of some difficulty, was directed to stand for argument.

Dec. 5th. Mr. *Leach*, for the executors, insisted, that they were not trustees of the residue for the next of kin. The words importing disposition, "I give and bequeath," being struck out of the residuary clause, the only remaining words show no intention to bequeath the subject, of which they are merely an enumeration; therefore the executors, * not being substituted for [* 351] Lord Newark, and having no legacy, take the residue, not by the intention, but as being undisposed of.

Mr. *Martin*, Mr. *Cooke*, and Mr. *Shadwell*, for the next of Kin.— Though there is no case precisely similar to this, it is governed by the principles which decided the cases of *The Bishop of Cloyne v.*

Young (1), and *Newill v. Parker* (2). The residuary clause, though revoked as to the objects, is not revoked entirely ; and what remains is a sufficient indication of an intention to make a residuary disposition ; which is confirmed by the exception of specific articles expressly for a different disposition, and the observation upon the power to apply part of the legacies of the Plaintiffs and the nephew, for their advancement, "this should be modified." The intention by naming these executors in the margin was to substitute them for the other.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—It is quite settled, that any indication of the testator's intention to dispose of the residue is sufficient to exclude the executor ; though it may be wholly uncertain, what disposition he intended to make of that residue. Here, as the Will originally stood, there was an express disposition of the residue. From whatsoever motive, the testator cancelled that part of the residuary clause, designing the persons to take interests in the residue, and the events, in which they were to take those interests. The Will, even in its altered state, furnishes sufficient evidence, that it was in the testator's con-
[* 352] templation to * make the residue the subject of testamentary disposition ; as, after disposing of several parts of his property, he begins the clause—"And" thus connecting this with the preceding disposing clauses ; "as to all my ready money, securities for money, stock in the public funds, goods, chattels, personal estate and effects whatsoever, and—"

'That is the proper commencement of a residuary clause ; and it shows, the testator did not mean his Will to be entirely silent with regard to the residue ; though he has not gone on to specify the disposition he intended to make of that residue. It is admitted, that, if he had added the words, "I give and bequeath," though without saying to whom, the executors would have been excluded. It would then have been the case of *The Bishop of Cloyne v. Young* (3) in terms ; but it appears to me, that the clauses are substantially the same. A disposition in favor of no one is no disposition ; it is only evidence, that the testator had it in contemplation to make some disposition. The insertion of a residuary clause, in the style and form proper for such clause, furnishes just the same evidence ; as it is not to be supposed by reasonable intendment, that the clause, if perfected, could have terminated otherwise than in some disposition of the property described. Any intention of disposition would be sufficient to exclude the executor : even supposing the intention to have been to give the residue to the executor himself ; who then, as Lord Hardwicke observes, was intended to take, not in the character of executor, but by express bequest.

This testator has left his Will in such a state, that his real intention may probably be disappointed by the judgment, which the

(1) 2 Ves. 91.

(2) Cited 2 Ves. 95, 100.

(3) 2 Ves. 91.

Court is obliged to form, without a knowledge of his actual intention, from what appears upon the face of the instrument: but I do not believe, from any thing that I see in this Will, that his intention was, that the executors should in that capacity take the residue (1).

SEE note 4 to *Nourse v. Finch*, 1 V. 344.

COLLINSON v. ———.

[1811, Dec. 5.]

WRIT of *Ne exeat Regno*, on affidavit, not by the Plaintiff, to information and belief of intention to quit the Kingdom, according to the nature of the information; as, where received from persons of the Defendant's family, that they were about to go to the Isle of Man.

Prayer for the writ of *Ne exeat Regno* in the Bill not essential; nor affidavit of the debt, established by the Master's Report, absolutely confirmed (a).

No notice of Motion for the writ of *Ne exeat Regno*, [p. 355.]

A MOTION was made for a writ of *Ne exeat Regno* against the Defendant, on an affidavit, not by the Plaintiff, but another, to belief of the Defendant's intention to quit the kingdom, upon information, received from two persons of his family, that they were about to go to the Isle of Man. The Bill did not pray the writ; nor was there an affidavit of the debt; but it appeared by the Master's Report absolutely confirmed.

Mr. *Bell*, in support of the Motion.—The several recent applications for this writ, from the case of *Russell v. Asby* (2) to *Jones v. Alephsin* (3), have not completely settled whether information and belief are a sufficient ground for granting it. In *Russell v. Asby* Buller, Justice, held an affidavit, stating positive belief, that the party was going to quit the jurisdiction, sufficient without stating the reason of that belief. In *Etches v. Lance* (4) your Lordship thought the ground of belief *must be stated. The conclusion seems to be, that it must depend upon the nature of the information and belief: for instance, that the regiment, of which the Defendant is an officer, is ordered abroad; as that may be mere information from the newspapers. This application is made

(1) See the various cases upon the question between Executor and next of kin, as to residue undisposed of, in the note, *ante*, vol. i. 362, *Nourse v. Finch*.

(a) For the recent authorities showing resort to writs of *ne exeat* in the United States, see *ante*, note (a) *De Carriere v. De Calonne*, 4 V. 577; note (a) *Coglar v. Coglar*, 1 V. 94; note (a) *Russell v. Asby*, 5 V. 96, note (a), 98.

(2) *Ante*, vol. v. 96.

(3) *Ante*, vol. xvi. 470.

(4) *Ante*, vol. vii. 417; *Amisick v. Barklay*, viii. 594; *Hannay v. M'Entire*, xi. 54, and the notes, i. 95; iv. 592; *Howden v. Rogers*, *Dick v. Swinton*, 1 Ves. & Bea. 129, 371. Mr. Beames's Brief View of the Writ of *Ne exeat Regno*.

upon an affidavit, not by the Plaintiff, but another person, of firm belief, upon positive information from two branches of the Defendant's family, that they are going to the Isle of Man.

It is not necessary, though usual, that the Bill should pray the writ; *Loyd v. Cardy* (1). In *Ex parte Brunker* (2) it was refused without a Bill filed; but the ground was, that the application was not properly a subject of equitable jurisdiction, but in aid of the Law; and sought the effect of execution before judgment. The intention to go abroad may arise in the progress of a cause; and this is that case. There is no affidavit of the debt; but the Master's Report, which is absolutely confirmed, is quite sufficient.

The Lord CHANCELLOR [ELDON].—As to the latter point the authorities referred to leave no doubt; nor should I have had much, if no authority had been mentioned. When this prerogative writ came to be applied as a civil process, it would have been an extraordinary exercise of jurisdiction to refuse it merely as not prayed in a stage of the proceedings, when there was no pretence for praying it. If, when the Bill was filed, the Defendant did not intend to leave the kingdom, it would have been highly improper to pray the writ. A

groundless suggestion, that the Defendant means to abscond, * would press too harshly; and would also operate to create the very mischief which the Court, permitting the Motion without notice, means to prevent. The omission to pray the writ therefore forms no objection.

The other point has frequently embarrassed me; but there are cases, in which the Court appears to have regarded, and acted upon, the nature of the information and belief. The information as in this instance given by persons of the Defendant's family; who therefore could not be brought forward to make an affidavit; and the circumstance, that the party has not made the affidavit, has not been considered an objection.

The Master's Report, absolutely confirmed, is quite sufficient, without an affidavit of the debt.

The Writ was granted.

WITH respect to the general doctrine, and practice, as to issuing the prerogative writ of *ne exeat* in civil causes between private parties, see, *ante*, the notes to *De Carriere v. De Calonne*, 4 V. 577.

(1) Pre. Ch. 171.

(2) 3 P. Will. 312.

THE MAYOR, ETC. OF LONDON v. HEDGER.

The MASTER of the ROLLS for the LORD CHANCELLOR.

[1810, Dec. 19, 21.]

COVENANT to repair, and at the end of the Term surrender, buildings in good condition does not preclude an Injunction against pulling them down, and carrying away the materials, just before the end of the Term.

THE Bill stated a lease by the Plaintiffs, dated the 1st of March, 1785, of premises in St. George's Fields to the Defendant Hedger, to hold from Lady-Day ensuing * for the term of [* 356] twenty-five years, at a rent of 500*l.*; containing a covenant by the lessee, that he, his executors, administrators, and assigns, would from time to time, and at all times, during the term, when and as often as need shall require, repair, &c. the premises, hedge, ditch, fence, and the same being so repaired, &c. at the end, expiration, or other sooner determination, of such indenture, with all doors, locks, windows, shutters, &c. and such other materials, as were then, or which should or might at any time or time afterwards during the said term be, set up, fixed, or erected, surrender, &c. with the fixtures contained in an inventory, in good condition, reasonable uses, &c. excepted.

The Bill farther stated, that the Defendant Hedger has granted under-leases; and he and his tenants, having erected several houses, are pulling them down, and carrying off the materials; and threaten so to do as to the whole: that the other Defendants are in possession as under-tenants; but as to the parts, or in what manner, the Plaintiff is unable to set forth; and by collusion with the Defendant Hedger are pulling down, &c.—praying a discovery, account, and injunction.

The Defendants put in separate Demurrers and Answers: as to the discovery, whether Hedger did not enter, is not in possession by himself or his under-tenants, and did not agree to grant under-leases; whether there were not at the time of granting those under-leases houses, &c. whether the lease did not expire at the time mentioned, or when he and his under-tenants by collusion have begun, and threatened and intend, to pull down, &c. whether they are in possession, and of what parts, whether they have pulled down and sold, &c. whether Hedger has, or has not, interfered to prevent * them; whether the Plaintiffs have made applications, &c. whether the Defendants refuse, and why, and to all the relief, they demurred for want of equity: and for answer to the rest of the Bill say, they believe the Plaintiffs are seised or entitled, and the indenture of lease was made between them and Hedger, as stated in the Bill. [* 357]

Sir Samuel Romilly, Mr. Johnson, and Mr. Fisher, in support of the Demurrers; Mr. Richards, and Mr. Bell, for the Plaintiffs.

Dec. 21st. The MASTER OF THE ROLLS [Sir WILLIAM GRANT] (1) said, he had looked into the cases: and did not think that the covenant in the lease would preclude the Plaintiffs from an Injunction.

The Demurrers were accordingly over-ruled.

WHERE there is a fair ground of suspicion that a lessee does not mean to perform a covenant, having relation to the sort of enjoyment of the demised premises, after the expiration of the term, for which the landlord has stipulated; a decree in the nature of a decree *quia timet* may be obtained, notwithstanding there might be compensation in damages: *Ward v. The Duke of Buckingham*, cited in 10 Ves. 161, S. C., 3 Br. P. C. 93, (fol. edit.) As to the cases in which an injunction to restrain the commission of waste by a lessee will clearly issue, see, *ante*, the note to *Pulteney v. Shelton*, 5 V. 147.

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DUPUIS v. EDWARDS.

[ROLLS.—1811, MARCH 21; 1813, AUGUST 3, 4, 5.]

JURISDICTION of a Court of Equity upon objections to the Memorial of an Annuity. Annuity, secured on Dividends of Stock, standing in trust among other things for the grantor for life, not within the exception in the Annuity Act.

Omission in the Memorial of an Annuity under the stat. 17 Geo. III. c. 26, (repealed by 53 Geo. III. c. 141,) of a proviso for stay of Execution under a Judgment, one of the securities, until 20 days after default, was fatal.

Not necessary under the stat. 17 Geo. III. c. 26, to insert in the Memorial of an Annuity a covenant for payment, or any particular remedy, except as creating a trust within the Act; and as to the necessity of stating the trusts, *Quære*.

By indenture, dated the 22d of February, 1800, in consideration of 950*l.* paid by the Defendant Edwards to the Plaintiff at or before the sealing and delivery the Plaintiff granted to the Defendant, his executors, administrators and assigns, an annuity of 132*l.* for the natural life of the Plaintiff, to be paid half yearly on the 22d of August and 22d of February, to be issuing and payable out of and charged upon the residue of dividends of 3 per cent. Bank Annuities, after deducting another annuity of 50*l.* to Letitia Miles under a Decree, and also a proportionable part of the said annuity up to the day of the death of the Plaintiff, in case he should die before the expiration of any half year; with a covenant, that the Plaintiff, his heirs, executors, or administrators, should pay the annuity, &c.; and that, in case default should be made on the day, &c. or in case the Plaintiff should sell, or offer to sell, his interest in any part of the said Bank Annuities without consent in writing of Edwards, his executors, &c. then and in either of such cases it should be lawful to Edwards, his executors, &c. at the costs and charges of the Plaintiff, to apply by Petition or Motion for an Order to be made by

(1) *Ex relatione*.

this Court to be paid by the Accountant General out of the said dividends in future, not only the said annuity, but also the arrears, together with all costs and charges attending the application, and to instruct Counsel to consent for the Plaintiff, and to execute and concur in all farther acts, * &c.; appointing Ed- [*359] wards his attorney for the purposes aforesaid.

The Plaintiff also executed a warrant of attorney, of even date with the deed, authorizing Philipson and Lamb to confess judgment upon 2000*l.*; and it was declared, that the judgment so entered up was, and that Edwards should stand possessed thereof as, an immediate security for the better and more effectual payment of the annuity; but that no execution should be taken out upon the said judgment, until some half-yearly payment should be in arrear twenty days.

The bill, suggesting that no proper memorial had been enrolled, prayed, that the annuity may be declared void, and with the warrant of attorney, &c. may be delivered up: that the accounts may be taken; and that the payments of the annuity may be applied, first to the interest, and secondly to the principal, of the money advanced; offering to pay the balance if any was due.

A memorial was enrolled of the indenture between, &c. whereby the Plaintiff in consideration of 950*l.* did grant, &c. one annuity, &c. charged upon all those therein before mentioned residue of 3 per cent. Bank Annuities, after deducting the annuity of 50*l.* to Lætitia Miles, as by the said Decree is directed; and also a proportionable part up to the day of the death of the Plaintiff, &c.; and also a warrant of attorney, bearing even date, &c. authorizing Philipson and Lamb to confess judgment upon 2000*l.*; also of a judgment against the Plaintiff for the said 2000*l.*, besides costs; and which said indenture and warrant of attorney, as to the due execution thereof respectively, are witnessed by Thomas Philipson and Thomas Lamb.

* The objections taken to the memorial were, first, the [*360] omission of the covenant, binding the grantor and his heirs; secondly, the omission of the clause, that in case of default in payment, or in case the Plaintiff should sell or offer to sell his interest in any part of the Bank Annuities without the consent in writing of Edwards, his executors, &c. he should be at liberty to apply to the Court; thirdly, the omission of the proviso for stay of execution upon the judgment, until some half yearly payment should be in arrear twenty days.

For the Defendant, two preliminary objections were taken: first, to the jurisdiction; secondly, that a memorial was not necessary; the transaction being a sale of dividends; and, if it could be considered as a grant of an annuity, being secured by a transfer of stock, it was not within the Statute (1).

(1) Statute 17 Geo. III. c. 26. Repealed by Statute 53 Geo. III. c. 141; which gives a short form of a Memorial for future Annuities. See the note, ante, vol. ii. 36.

Mr. Hart and Mr. Cooke for the Plaintiff; Sir Samuel Romilly, Mr. Leach and Mr. Courtenay, for the Defendant.

March 21st. The MASTER OF THE ROLLS [Sir WILLIAM GRANT]. —The object of this bill is to set aside the grant of an annuity, and to have the deeds delivered up to be cancelled upon the sole ground of defects in the memorial. The Defendant's Counsel made a previous question as to the jurisdiction of the Court, and another as to the necessity of enrolling any memorial in this case. As to the question of jurisdiction, it has been so often affirmed [*361] and *exercised, that I do not think it is open to me to enter into the discussion; otherwise I should think, there is no ground whatsoever for a doubt upon it. As to the other preliminary point, it is contended, that any memorial was unnecessary in this case, for two reasons: first that the transaction is to be considered rather as a sale of dividends than as the grant of an annuity; secondly, that, if a grant of an annuity, it is an annuity secured by a transfer of stock. As to the first point, the transaction is evidently both in form and substance the grant of an annuity, secured upon dividends of stock, and not merely an assignment of the dividends. As to the other point, this is no otherwise a transfer of stock than as stock was standing upon trust, among other things, to pay the dividends to the grantor for life, upon which he secured the annuity; but the transfer, spoken of by the act, is an actual transfer of stock, the dividends whereof are of equal or greater annual value than the annuity; as was held by the Court of King's Bench in the case of *Duff v. Atkinson*. Here no transfer of stock was, or could have been, made; the grantor being only tenant for life.

Then, as to the defects of the memorial: first, the omission of a covenant, by which the grantor was bound for his heirs; secondly, the omission of a clause, that by non-payment, or in case the grantor should attempt to sell his interest in the fund without the consent of the grantee, he should be at liberty to apply to the Court for an order to be paid by the Accountant-General; thirdly, the annuity being farther secured by a warrant of attorney to confess judgment, with a proviso that no execution should be taken out until some half yearly payment should be in arrear twenty days; it is alleged, that the omission of this proviso renders it invalid.

[*362] * As to the first objection, the case of *O'Callaghan v. Ingilby* (1) has determined, that it is not necessary to insert a covenant for payment of the annuity. As to the power to apply to the Court for an order for payment by the Accountant-General, there is nothing in the act making it necessary to insert any particular remedy, to which the grantee is authorised to resort. In the case just alluded to it was held, that powers of entry and distress need not be stated, except so far as they create a trust which brings them within the branch of the act relating to trustees.

Here there is no trust ; and the cases, where the Court of King's Bench have held it necessary to state the trusts, have been questioned in *Defaria v. Sturt* (1).

Then, as to the stay of execution upon the judgment ; if this were *Res integra*, I should doubt, whether there is any thing in the Annuity Act, making it necessary to introduce such a proviso in the memorial : but that point is expressly determined in *Cunningham v. Mackenzie* (2), and *Orton v. Knight* (3) ; where it was held, that if an annuity be secured by a warrant of attorney to confess judgment, and there is a stipulation in the deed, that execution shall not be taken out for a given number of days, that agreement must be inserted in the memorial ; and the omission of it is fatal. Conceiving myself bound by these two decisions of a Court of Law, I must, with great reluctance, set aside this annuity, and direct the consequential account (4) to be taken ; and I shall make that Decree, without costs.

* After the decision of the case of *Horwood v. Underhill* (5) in the Exchequer Chamber, reversing the judgment in the Court of King's Bench, this case was again brought before the Master of the Rolls by a petition of re-hearing ; when the same objections to the memorial were repeated ; and farther objections were taken. [* 363]

Mr. Hart and Mr. Cooke, for the Plaintiff.—The general objection is, that this memorial, not disclosing all, that ought to be disclosed, is not a fair representation of the deed ; admitting, that the objection, from not stating that the heirs are bound, is done away by the decision of the Exchequer Chamber. The memorial is silent as to that important part of the transaction, within the expressed terms of the act, the persons, by whom and to whom, the consideration was paid, and the manner of payment ; secondly, as to the clause, providing the farther benefit of an order for payment by the Accountant-General in default of payment, or in case the Plaintiff should offer to sell any part of the fund without the Defendant's consent in writing ; enabling the grantee to use the grantor's name without consent ; and engaging for his concurrence in any farther act, that might be requisite to obtain the benefit of that order ; thirdly, as to the defeasance, embodied in the instrument, against the effects of that judgment, which the grantor was to confess.

The silence of the memorial as to these points is upon the decisions fatal. The rule, that every material stipulation in the instrument should be stated in the memorial, * *Cum*— [* 364]

(1) 2 Taunt. 225.

(2) 2 Bos. & Pul. 598.

(3) 3 Bos. & Pul. 153.

(4) *Holbrook v. Sharpey*, post, vol. xix. 131 ; *Byne v. Vivian*, ante, v. 604.

(5) 10 East, 123 ; 4 Taunt. 346 ; *Underhill v. Horwood*, *Ware v. Horwood*, ante, vol. x. 219 ; xiv. 28.

mins v. Isaac (1) was followed up by *Taylor v. Johnson* (2) and *Detenfans v. O'Brien* (3); and upon many other decisions this general way of setting forth the consideration cannot stand, *Rumball v. Murray* (4), *Kirkman v. Price* (5). The contract between these parties depends in a great measure upon the covenants to be entered into. The memorial ought to be such, that, according to Lord Kenyon's expression, the *Res gesta* may appear; that any person may know what the annuity is; to whom, and by whom, payable; for what consideration, and what are the particular terms; so that it may not be necessary to resort to the deed for the truth of the transaction. It is impossible to collect that information from this memorial.

Another objection is to the statement of the attestation, that the indenture and warrant of attorney respectively are witnessed by the two persons named; not distinguishing the attestation to each instrument. *Hart v. Lovelace* (6).

Sir. Samuel Romilly, Mr. Leach, and Mr. Courtenay, for the Defendant.—There is no authority, requiring the memorial to state by whom, and to whom, the consideration, that is, what induces to the grant, was paid. Some loose expressions to that effect fell from the Lord Chancellor in *The Duke of Bolton v. Williams* (7): but the consideration expressed in that memorial, was quite different from that really paid; and it was very material, that the particular mode of payment should appear. If it is necessary, that these circumstances should be stated, that necessity consists only in Lord Kenyon's declaration that the *Res gesta* must appear; as, if the consideration was not of the nature of money, but notes, which might not be paid. It must then depend upon the fact; and the plain meaning here is, that the consideration was paid by the grantee to the grantor. That is the fact: and it is so stated in the deed. Upon this ground the omission of the clause of redemption, a most material part of the *Res gesta*, would be fatal to a memorial: but that expression must be construed with reference to what the Statute requires. If it is to be carried to the extent now pressed; a clause of distress also, which never was in a memorial, with any limitation of time, to which it may be subject, must be inserted. That expression of Lord Rosslyn is expressly contradicted in *Ex parte Russell* (8). The result of all the decisions is merely, that the real transaction must appear in the memorial; not that it must be stated in any particular way. No one can be deceived by this memorial.

The next objection turns upon the same point. The real trans-

(1) 8 Term. Rep. 183.

(2) 8 Term Rep. 184.

(3) 3 East, 559.

(4) 3 Term Rep. 298.

(5) 1 H. Black. 309.

(6) 6 Term Rep. 471.

(7) *Ante*, vol. ii. 138; see 153; 4 Bro. C. C. 297.

(8) 1 Bos. & Pul. 62.

action must appear; but it is not necessary to set out the whole deed, though such nice decisions have taken place upon this Act of Parliament, that it is frequently done for safety. The distinction is, that every thing, varying the situation of the grantor and grantee, must be stated; if, for instance, the annuitant is to have possession of an estate. The power to apply to the Court of Chancery is implied in the preceding statement, that the annuity is to be payable out of, and charged upon, the dividends; a power, which, had it not been expressed, is the natural effect of the security.

* Then, as to the third objection, that the provision for [* 366] stay of execution is not stated, the only interpretation of this Statute is, that substantially the transaction must appear upon the memorial; and the provision, that a certain number of days must elapse, before execution can be taken out, can hardly be considered so substantial, that the omission of it should by vitiating the memorial annul the transaction.

As to the objection upon the attestation, the plain meaning, corresponding with the fact, is, that each instrument, the indenture and the warrant of attorney, was attested by two witnesses. In the case cited the deed was stated to have been executed in the presence of two persons named, or one of them. In *Ex parte M' Reth* (1), upon an objection the converse of this, the construction of the statement, that the bond, warrant of attorney, indenture and deed-poll, are witnessed by four persons named, was, that each instrument was witnessed by the four.

Mr. Hart, in reply.—The intention of the Legislature was to record upon the evidence of the grantee himself all the facts. That is the meaning of Lord Kenyon's expression, that the *Res gesta* must appear; and the question has always been, whether the omission was of a material fact, which the memorial, as a correct abbreviation of the instrument, ought to contain. It may perhaps be implied, that the consideration was money, unless expressed to be something different; but the act, declaring that the memorial shall state specifically by whom, and on whose behalf, the consideration was advanced, must surely be understood as requiring the circumstances

* of the payment to appear in that instrument, which is intended to be a fair and reasonable disclosure of all the important parts of the deed. All was to appear by direct averment, leaving nothing to implication. [* 367]

Aug. 5th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT], having read the note of his judgment above stated, observed, that it turned, not upon the case of *Horwood v. Underhill*, but entirely upon the omission of the power for stay of execution, which was held a fatal objection by the Court of Common Pleas in two cases, determining the very point. Therefore the reversal of the judgment,

pronounced by the Court of King's Bench on *Horwood v. Underhill*, could not affect this Decree.

The Decree was accordingly affirmed.

SEE, *ante*, notes 2, 3, to *Hood v. Burlan*, 2 V. 292; and the notes to *Byne v. Vivian*, 5 V. 604, as to the jurisdiction of the Court of Chancery to set aside grants of annuities upon the ground of defects in the memorials. But it should be observed, that, notwithstanding the impression as to the effect of the decisions of law, which Sir William Grant entertained, and by which he, reluctantly, thought himself bound to hold, that the omission in a memorial of an annuity of a proviso for stay of execution for a limited number of days after default of payment, was a fatal objection; it has since been determined, that, as the memorial of an annuity need not state the extent of the remedy, so, by parity of reasoning, a proviso for stay of execution, which is but a qualification of the extent of the remedy, need not be stated: *Doe v. Phillips*, 5 Mau. & Sel. 371.

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CHAMBERS v. BRAILSFORD.

[ROLLS.—1811, FEB. 7, 11.]

DEVISE in remainder to "the said T. B. for life," and after his decease to "the said T. B. son of my nephew S." and his heirs. A nephew of the same name "T. B." not being before mentioned, and in every other instance the devisee being pointed out by reference and particular description of the degree of relationship, the great-nephew held to be intended in both limitations.

Bequest of accumulated fund from real and personal estate, when the legatee attains twenty-one, upon his death under that age a resulting trust for the respective representatives (a).

Devise, when the devisee attains twenty-one, a resulting trust for the heir until that period; and by the previous death of the devisee the remainder accelerated.

SAMUEL BRAILSFORD, by his Will, dated the 7th of February, 1792, directing his debts to be paid, and giving several annuities and legacies, gave to his wife for her own use during life, his silver plate, household linen, &c.; and after her decease, to his executors, for the use of Samuel Brailsford the younger, son of his nephew Samuel Brailsford, until he should attain to the age of twenty-one years; but if he should die before he attained to the age of twenty-one years, then that his said silver plate, &c. should go to Thomas Brailsford, the eldest son of his nephew Samuel Brailsford, when he should attain the age of twenty-one years.

After some farther legacies, &c. the testator gave "unto Samuel Brailsford, (second son of my nephew Samuel Brailsford), when he shall attain the age of twenty-one years," all his sums of money and securities, surplus of rents, &c.; but if the said Samuel Brailsford the younger should die before he attains the age of twenty-one years, the

(a) Any unexhausted residuum becomes a resulting trust for the legal representatives of the testator. 2 Story; Eq. Jur. § 1196a; *Cook v. Hutchinson*, 1 Keen, 42; 4 Kent, Com. (5th ed.) 306.

testator gave the above legacy to and amongst the sisters of the said Samuel Brailsford the younger, if any there should be, and as tenants in common, equally, share and share alike, as they attain the age of twenty-one years.

The testator then devised all his freehold, copyhold, and real estates whatsoever and wheresoever, to his *brother [* 369] John Brailsford and two others, their heirs, &c. upon trust that "Thomas Brailsford the younger, son of my nephew Samuel Brailsford, shall enter upon" all his freehold and copyhold estates in the counties of Nottingham and Derby, when he attains the age of twenty-one years, to hold for and during the term of his natural life; and from and after his decease unto and to the use of the first-born son of the body of the said "Thomas Brailsford, son of my nephew Samuel Brailsford," and the heirs of the body of such first-born son; and for default of such issue, to the use of "my brother John Brailsford" and his assigns, for and during the term of his natural life; and after his decease, to the use of "the said Samuel Brailsford, son of my nephew Samuel Brailsford," his heirs and assigns, for ever; and as to all the residue of his freehold and copyhold estates in the county of Lincoln or elsewhere, subject as aforesaid, in trust, that "the said Samuel Brailsford, son of my nephew Samuel Brailsford shall enter upon the same," and also upon all his lead mines, &c. in the counties of York and Derby, when he attains the age of twenty-one years, to hold for and during the term of his natural life; and from and after his decease, then in trust as to all his freehold and copyhold estates in the said county of Lincoln, and all his said mines, &c. to the use of the first-born son of the body "of the said Samuel Brailsford, the son of my nephew, Samuel Brailsford, and the heirs of the body of such first-born son; and for default of such issue to the use of my said brother John Brailsford and his assigns, for and during the term of his natural life; and from and after his decease to the use of the said Thomas Brailsford and his assigns, for and during the term of his natural life, and after his decease to the use of the said Thomas Brailsford, son of my nephew Samuel Brailsford, his heirs and assigns for ever."

The testator died, leaving John Brailsford, his only [370] surviving brother; who died soon afterwards without issue. Another brother, Thomas, died in the testator's life, leaving two children, Thomas and Samuel. The latter, who was the nephew mentioned in the Will, died in the testator's life, leaving two sons, Thomas and Samuel, the great nephews mentioned in the Will, both infants at the testator's death, and no daughters. Thomas the great nephew, attained the age of twenty-one in October, 1808; and his brother Samuel died in March, 1809, at the age of twenty, unmarried.

The Bill was filed in September, 1809, by the trustees and executors to have the Will established, &c.

Thomas Brailsford the elder, the testator's nephew, claimed as

heir at law and customary heir, being the eldest son of the testator's eldest brother; submitting, that all the rents and profits and accumulation from the freehold and copyhold estates devised in the counties of Nottingham and Derby were undisposed of from the testator's death to the time of Thomas Brailsford's, the great nephew, attaining the age of twenty-one; and that all the rents and profits, and accumulation from the estates in Lincolnshire, &c. and the lead mines, from the death of the testator to that of his great nephew Samuel, were also undisposed of; claiming also, as the only surviving nephew and next of kin, such part of the personal estate as was undisposed of; and submitting, that he is entitled to an estate for life in the freehold and copyhold estates in the county of Lincoln, &c. and the lead mines.

The Answer of Thomas Brailsford the younger, the [* 371] great nephew of the testator, insisted, that on his *attaining the age of twenty-one he became entitled to the estates in the counties of Nottingham and Derby for life, and upon the death of his brother Samuel to the residue of the estates in the county of Lincoln, &c. and the lead mines, &c.; and is also entitled to the rents of the last-mentioned estates and mines accrued since the death of his brother; and that by the words "the said Thomas Brailsford" he was meant, and not Thomas Brailsford the nephew.

Mr. *Leach* and Mr. *Roots*, for the Defendant, Thomas Brailsford the elder.—As to the real estates the question is, what interest the heir takes for want of disposition in the interval, terminated by the majority of one devisee and the death of the other: as to the personal estate, what is meant by "surplus of rents." There is nothing in the antecedent part of the Will, that explains those words; but from the subsequent part it may be collected, that they mean the surplus, after satisfying the other bequests of the Will. The rents of the estates first devised, to accrue before Thomas attains twenty-one, are no where given in that part of the Will: they are, therefore, part of the surplus rents, with which the testator meant to form his accumulating fund. As to the other class of estates, what are the surplus rents? He gives no interest, until Samuel Brailsford attains twenty-one; therefore, until that period the heir takes this property also as undisposed of; no trust being declared except that, which is not to take effect, until the devisee attains twenty-one. Against this it must be contended, that upon his death the subsequent remainders were accelerated, and take effect from that period. The person to

contend that is Thomas Brailsford, the great nephew, the [* 372] devisee of the other estates * in which he is to take nothing until his age of twenty-one; and this construction would give him an interest in these estates before that age. The limitation to the sisters however, is decisive; who, by this construction, accelerating the remainder over, would take nothing under this gift of the same accumulated fund that Samuel was to take when twenty-one. The effect is, therefore, a trust, not commencing before the age of

twenty-one; and therefore the surplus rents are undisposed of until that period.

Secondly. The words "the said Thomas Brailsford" must be taken to mean the nephew, though not before named; according to the case in *Hawkins* (1), that, father and son having the same name, the son, not the father, is distinguished by an addition, and Goodright on the demise of *Hall v. Hall* (2). The Thomas Brailsford before-named cannot be intended. The words "the said" may be considered surplusage, not words of reference. Either it is void for uncertainty; or there must be an inquiry.

Sir *Samuel Romilly* and Mr. *Bell*, for Thomas Brailsford, the great nephew, gave up the question as to the estates of Nottingham and Derby; contending, as to the other estates, that Thomas became entitled upon the death of Samuel, at whatever time that event might happen. The testator intended to give some surplus rents for some period; but how can it be inferred, that he meant the rents until Samuel should be twenty-one? Until that period the sisters would have been entitled by express disposition.

Upon the other point, the true construction is, that immediately upon the death of Samuel the limitation is * to [* 373] Thomas, the great nephew, with remainder to him in fee. If conjecture is to be indulged, there is certainly reason to doubt, whether the same person is intended in these different limitations; but that purpose appears in express words, which by the other construction must be struck out, though free from ambiguity, and capable of a clear, definite sense. The Will takes not the least notice of the other Thomas Brailsford; and the description "the said" is prefixed to exclude all doubt; and is several times repeated. It is true, he is afterwards described more particularly; but it is very extraordinary, if there another person was intended. Against a particular description, frequently repeated, it is not sufficient, that there is room for conjecture. In the cases referred to, of two persons of the same name, the one mentioned without addition was construed the elder; but that cannot apply where there is a particular description. An inquiry is directed only in the case of latent ambiguity.

The MASTER OF THE ROLLS observed, that it was a singular limitation to a person for life, and after his death to him and his heirs.

Sir *Samuel Romilly* admitted that; but said, such limitations are met with in Wills; the testator, perhaps, not aware that the estates would unite, and meaning to prevent the power of alienation.

Feb. 11th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT]. As to the question upon the claim of Thomas Brailsford, the son of the testator's brother Thomas, to be tenant for life of the Lincolnshire estate and the lead * mines, it is impossible to [* 374]

(1) 2 Hawk. P. C. 271, s. 106.

(2) 1 Wils. 148.

contend, that there is, *prima facie*, any ambiguity (1) in the description. By the words "the said Thomas Brailsford" the Thomas Brailsford, who had been before mentioned, is sufficiently described. The argument on the other side rests chiefly on the alleged inconsistency of giving to the same person, in the same sentence, an estate for life and also an estate in fee. There is certainly a particularity in that; but the devise, as it stands, is not so insensible or contradictory as to drive the Court to the necessity of expunging or adding words to give it a meaning. It is observable, that in every other instance the testator is particularly careful to specify the degree of relationship of the devisee, even after he has used the word "said." It is not, therefore, very likely that he should omit all description of a person, who had not before been mentioned; which, however, would be the case, if the first part of the limitation were to be understood to apply to Thomas the nephew, and not to Thomas the grand nephew.

With regard to the period, from which Thomas Brailsford was to take the rents and profits of the estates devised to Samuel for life, it is clear he took a vested remainder subject to the precedent estates; and, when they determined, the remainder must vest in possession, unless especially suspended. If the testator had contemplated the event, that has happened, he probably might have postponed Thomas Brailsford's enjoyment of the rents and profits of the Lincolnshire estate, as he had postponed his enjoyment of the estate, of which he is the first taker; but the testator has not done that; and there is no probability, that he would have postponed Thomas's enjoyment, not only until he himself should have attained twenty-one, but also until the period, at which his younger brother

Samuel would, if he had lived, have attained that age. It [* 375] is argued by implication, that it must have been intended * to suspend the possession; for, as the rents, until Samuel should attain twenty-one, would have made part of that accumulated fund, which he would have taken at that age; and as the sisters of Samuel, if there were any, were in the event of his death under twenty-one to take precisely the same legacy, that he would have taken, if he had attained that age, it follows, that the rents and profits must notwithstanding his death under twenty-one go into this fund: else his sisters would not have had the same legacy that he would have taken. This clause, however, only specifies the subject of the bequest, comprehending, among other articles, the surplus rents; but it is from other parts of the Will that we must discover what were to be reckoned surplus rents. Samuel would have taken the surplus rents accruing in his minority; so would his sisters; but it does not follow, that all, that would have been surplus rents in his time, would after his death be so. That depends upon the disposition of the testator; according to which after the death of Samuel there were no surplus rents.

(1) See *Parsons v. Parsons*, *ante*, vol. i. 266, and the note, 267.

In the events, that have happened, the accumulated fund is undisposed of. Such part as is real estate must go to the heir-at-law; and such part as is personal property to the next of kin (1).

1. For a summary of some of the leading general rules to be observed in the construction of testamentary instruments, as well as the qualifications which those general rules may occasionally require, see, *ante*, notes 4 and 5 to *Blake v. Bunbury*, 1 V. 194. As to the admissibility of parol evidence to remove latent ambiguities, see the notes to *Baugh v. Read*, 1 V. 257; and the notes to *Parsons v. Parsons*, 1 V. 266.

2. The proceedings in the principal case before the Lord Chancellor are likewise reported in 2 Meriv. 25.

[* 376]

THE EAST INDIA COMPANY v. EDWARDS.

The MASTER of the ROLLS for the LORD CHANCELLOR.

[1811, MAY 20.]

INTERPLEADER upon color of title given to a stranger (a).

THE Bill stated, that in the latter end of the year 1799 the Defendant John Edwards contracted to supply the Plaintiffs with fifty sets of leather hose for fire engines, at certain rates, amounting for the whole to the sum of 1777*l.* 2*s.* 6*d.* payable by instalments on the 7th and 29th of September, the 5th of November, and the 21st of December, 1810; that Edwards afterwards, as it is alleged, assigned the contract to Robert Dickenson; and that the leather hose were supplied and delivered to the Plaintiffs by Edwards and Dickenson, or one of them.

The Bill farther stated, that, before any of the instalments were due, and before the Plaintiffs had heard of the alleged assignment, they on the request of Edwards advanced to him 1000*l.* on account; and he has lately commenced an action at law against the Plaintiffs for the sum of 760*l.* 19*s.* 8*d.* remaining due under the contract; that the Defendant Dickenson pretends, that by indentures, dated the 7th of December, 1809, Edwards assigned the contract and all

(1) This Decree as to the devise of the Lincolnshire estate, &c. to Thomas Brailsford for life and in fee, affirmed on Appeal, *post*, vol. xix. 652; 2 Mer. 25; see the note, *ante*, vol. v. 247, upon the construction of Wills.

(a) A Bill of Interpleader will be defective, if it does not admit and show a title in each of the claimants. Story, Plead. § 295; 2 Story, Eq. Jur. § 821; Mitf. Eq. Pl. by Jeremy, 141, 142.

The ground upon which a plaintiff in such a case comes into Equity is, that claiming no right in the subject-matter himself, he is, or may be, vexed by having two legal or other processes in the names of different persons going on against him at the same time. *Atkinson v. Marks*, 1 Cowen, 703; *Richards v. Salter*, 6 Johns. Ch. 445; *Bedell v. Hoffman*, 2 Paige, 199; *Badeau v. Rogers*, ib. 209; *Shaw v. Coster*, 8 ib. 339; Story, Plead. § 291, 292; 2 Story, Eq. Jur. § 807, 808, 814; Story, Bailments, § 110-112.

benefit thereof to him : and he performed the contract ; and is entitled to receive the said sum of 760*l.* 19*s.* 8*d.* : that Dickenson has given the Plaintiffs notice of the said alleged assignment ; and has directed them not to pay Edwards ; but Edwards pretends, that the assignment is for some reason, which he refuses to discover, void ;

and that he is not bound thereby ; and he threatens to proceed in the action ; and Dickenson threatens, * in case the Plaintiffs do not pay him, to institute some suit or suits against them to compel them to pay the said money to him ; and the said Defendants wholly dispute each other's right to the said sum ; and by means thereof and the other means aforesaid the Plaintiffs are in danger of being doubly harassed respecting the said sum of money ; and cannot with safety pay either of them.

The Bill prayed, that the Defendants may set forth, to whom the said sum of 760*l.* 19*s.* 8*d.* is due ; and that they may interplead, and settle their said demands between themselves ; the Plaintiffs offering to pay either of them, to whom the money shall appear to belong, being indemnified, or to pay it into Court ; that the Defendant Edwards may be restrained from proceeding in the said suit ; and that Dickenson may likewise be restrained from instituting any suit at law against the Plaintiffs touching the matters aforesaid.

The Defendant Edwards by his answer admitted the execution of the assignment ; which he set forth ; reciting, that Edwards, who had received the order, being unable to carry it into execution, it was agreed, that Dickenson should employ him as manufacturer, &c. that Dickenson should provide the materials, and pay the workmen ; and should, out of the profits to be received from the Company, in the first place retain the expenses, next 200*l.* in satisfaction of his profit ; and that Edwards should take the remainder, if any, &c. ; insisting, that the assignment, being illegal and usurious, is void ; and Dickenson is not entitled to demand any sum of money on account of the said loan either from this Defendant or from the Plaintiffs ; that, even if the assignment was not usurious and void, Dickenson had not per-

formed the agreement by advancing or supplying all the [* 378] money and * materials required ; that the Plaintiffs have not any equity or case to compel this Defendant to interplead with Dickenson, the said contract not being assignable by the regulations of the Plaintiffs, as a public Company ; and that under the circumstances Dickenson could not recover at law against this Defendant or the Plaintiffs any part of the said sum of 760*l.* 19*s.* 8*d.* remaining due on account of the contract.

Dickenson having become bankrupt, his assignees were brought before the Court by bill of revivor ; and a motion was made, that the Plaintiffs may be at liberty to pay the money into Court ; that the Defendant Edwards may be restrained from proceeding in the action at law against the Plaintiffs ; and that the Defendants, the assignees of Dickenson, may be restrained from instituting any suit at law against the Plaintiffs, &c.

Mr. *Cooke*, for the Defendant Edwards, objected, that this is not a case of interpleader; as no person except Edwards could maintain an action.

Mr. *Wyatt*, in support of the motion, contended, that the circumstances of this case fall within the principle of interpleader; as it is now understood, that the party shall not be doubly harassed by two suits, according to *The Duke of Bolton v. Williams* (1), where the legal estate was in one person: yet it was held a case of interpleader; and that was followed in *Angell v. Hadden* (2).

The MASTER OF THE ROLLS [Sir WILLIAM GRANT] granted the Injunction on the terms of paying the money into Court; observing, that Edwards had by his act given a color of title to another * person; and, until that was disposed of, could not [* 379] insist on payment to himself (3).

SEE the notes to *Dungey v. Angove*, 2 V. 304; and note 1 to *Angell v. Hadden*, 16 V. 202.

OSBORNE v. WILLIAMS.

[ROLLS.—1811, AUGUST 9.]

THE rule, "*In pari delicto melior est conditio possidentis*," preventing suit, is not universal; admitting degrees of guilt by concurring in the same criminal act (a).

Therefore against a private agreement, obtained by a father from his son, in derogation of an allowed sale of the command of a Post Office Packet by the former to the latter, an account was decreed.

Decree to refund money, obtained by sale of influence in marriage brokerage, [p. 382.]

Lord Thurlow's opinion, that in all cases money paid for an illegal purpose may be recovered (b), [p. 382.]

THE Bill stated, that John Osborne was in the year 1800 owner of The Diana, employed in his Majesty's service by the Post Office

(1) 3 Bro. C. C. 297; *ante*, vol. ii. 138.

(2) *Ante*, xol. xvi. 202.

(3) Upon this principle a Bill of Interpleader has been maintained by a tenant against his landlord. *Ante*, *Cowtan v. Williams*, vol. ix. 107; *Clarke v. Byne*, xiii. 383; see the note ii. 107.

(a) For the present acceptance of this rule, see *ante*, note (a) *Ex parte Bulmer*, 13 V. 313; note (a) *Watts v. Brooks*, 3 V. 612; note (a) *Thomson v. Thomson*, 7 V. 470; 1 Story, Eq. Jur. § 298, and notes.

(b) On Lord Thurlow's opinion Mr. Justice Story remarks; "This is pushing the doctrine to an extravagant extent, and effectually subverting the maxim, *In pari delicto potior est conditio defendentis*. The ground of reasoning, upon which his Lordship proceeded, is exceedingly questionable in itself; and the suppression of illegal contracts is far more likely, in general, to be accomplished by leaving the parties without remedy against each other, and by thus introducing a preventive check, naturally connected with a want of confidence, and a sole reliance upon personal honor. And so, accordingly, the modern

as a packet; and that upon his application the officers of the Post Office promised, that, if he would convey the vessel to his son George Frederick Osborne, they would appoint the son commander of the packet in the room of his father. Accordingly, by indenture, dated the 1st of July 1800, John Osborne in consideration of 800*l.* secured by bond, sold the packet to George Frederick Osborne; and, that assignment being duly registered, the father was superseded, and the son appointed to the command.

The Bill farther stated, that John Osborne afterwards prevailed on his son to let him, the father, take the profits, promising to allow his son 200*l.* per annum by way of salary as the commander; which agreement was entered into without the privity of the Post-Master-General; and is contrary to the regulations of the Post Office, illegal, and void; that by a memorandum in writing, dated [* 380] the 12th of November, 1803, John Osborne, in consideration of the affection he bore his son, gave up to him the full enjoyment of all the privileges, &c. of the packet; and the son engaged to hire her at the rate of 40*l.* per month from Christmas next; but notwithstanding such agreement John Osborne continued to receive the profits.

Both parties being dead, the Bill was filed against the executors of the father by the widow and executrix of the son; insisting, that the sale in July 1800 was valid; and the subsequent agreement, that the father should have the profits, and the son only a salary, was void, as being contrary to the policy of the Registry Acts (1), and also as a fraud upon the post office, and against public policy; and, if that agreement was binding, yet the son was the owner at law, and the Plaintiff, the widow, had married him, and the other Plaintiff consented to the marriage, and given a portion, upon the father's assurance, that the son should take the whole profits; therefore, any private agreement to prevent the effect of the legal conveyance was a fraud, and void, as against the Plaintiff; impeaching, as erroneous, an account in March 1806, as signed by the son, not as being allowed, but intended only to verify the credit side.

The Bill prayed a declaration, that George Frederick Osborne was entitled to the vessel, and her earnings and profits, from the 1st of July, 1800; that the alleged agreement in derogation of such right was illegal and void; and that the account made out is not binding as a stated account; and that an account may be taken upon the footing of such declaration, &c.

The Answer stated an agreement on the 24th of May, [* 381] 1800, previous to the appointment of the son, that in consideration of the father's resigning his command, allowing the son 200*l.* a year, and defraying the whole expense of every

doctrine is established. Relief is not granted, where both parties are truly in *pari delicto*, unless in cases, where public policy would thereby be promoted." 1 Story, Eq. Jur. § 298.

(1) Stat. 26 Geo. III. c. 60; Stat. 34 Geo. III. c. 68.

kind, that the vessel might incur, the son should give up to him all the profits and earnings in as full a manner as if he had continued in the command; and in case he should in future be inclined to relinquish to his son the profits, then upon the son's paying to him the full appraised value of the vessel, with her stores, &c. the agreement to be void.

The Answer farther stated, that notwithstanding the instrument of the 1st of July, 1800, they continued to act under the previous articles until the 5th of January, 1804; from which time the son agreed to take the vessel on hire at 40*l.* a month; and on the 6th of July following agreed to purchase her from his father for 800*l.*; and from that time only was considered the sole owner; submitting, that the agreement of 1800 was not illegal or void, being for valuable consideration, viz. the father's resigning the command in favor of his son, relinquishing thereby his claim to a considerable allowance for superannuation. The answer insisted on the account as settled and signed.

The cause, having been argued, stood for judgment.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—That the agreement, which is impeached by this Bill, was illegal, as being a fraud upon the Post Office, cannot be doubted after the case of *Hartwell v. Hartwell* (1): *and more particularly [*382] *Parsons v. Thompson* (2). I think it illegal also upon the ground of its being a fraud on the provisions of the Ship Registry Acts (3).. The father therefore could never have enforced it; but my doubt was, whether the father, having received the profits, this Court would decree them to be accounted for, and refunded; or whether the general rule, that *in pari delicto melior est conditio possidentis*, should prevail; as both are guilty of a violation of the Law. Upon an examination of the cases, however, I think the Plaintiffs are entitled to the relief sought by the Bill.

Courts both of Law and Equity have held, that two parties may concur in an illegal act without being deemed to be in all respects *in pari delicto*. I consider this agreement as substantially the mere act of the father. He put up to sale a situation, which the young man would naturally be desirous of obtaining, and could obtain only upon the terms prescribed by his father. In the case of *Morris v. M^cCulloch* (4) the parties were more independent of each other; yet the money paid was decreed to be returned. In *Goldsmith v. Bruning* (5), a marriage brocage case, the party obtaining money by the sale of her influence, must have been considered as more criminal than the purchaser; for she was decreed, first, at the Rolls, and afterwards upon Appeal, to refund the sum, which she had received.

(1) *Ante*, vol. iv. 811; see the note, 816; *Thompson v. Thompson*, vii. 470.

(2) 1 Hen. Black. 324; *Garforth v. Fearon*, 1 Hen. Black. 327.

(3) Stat. 26 Geo. III. c. 60; Stat. 34 Geo. III. c. 68.

(4) Amb. 432.

(5) 1 Eq. Ca. Ab. 89.

There is no case, calling in question that decision. Lord Thurlow, indeed, in *Neville v. Wilkinson* (1) seems to have thought, [* 383] that in all *cases, where money was paid for an illegal purpose, it might be recovered back; observing, that "if Courts of Justice mean to prevent the perpetration of crimes, it must be, not by allowing a man, who has got possession, to remain in possession, but by putting the parties back to the state, in which they were before."

It is however unnecessary in the present case to lay down so broad a rule. These parties are not, I think, *in pari delicto* by entering into this illegal agreement. It was not confirmed, if indeed it admitted confirmation, by signing the account in March 1805.

The account must therefore be taken as if George Osborne had been from the beginning the actual owner of the packet, and entitled to all its earnings. As the Plaintiff chooses to open the account, the Defendants are not bound by any deductions, which they agreed to make, if they can establish a right to the sums deducted.

The Decree declares, that the agreement between John Osborne and George Frederick Osborne, dated the 24th day of May, 1800, is void, as contrary to the policy of the Registry Act, and also as being contrary to public policy; and that the said George Frederick Osborne was therefore entitled to the said sloop or vessel called the *Diana*, and her stores, tackle, and materials, and the Post Office salary, and earnings and profits of the said sloop or vessel, from the 1st day of July, 1800, as a purchaser thereof for the sum of 800*l.*; for which the bond bearing date the 1st day of July, 1800, in the pleadings stated, was given; that the settled account of the 22d day of March, 1805, in the pleadings mentioned, was not therefore binding on the said George Frederick Osborne or his executors; and directs an account of all sums of money received by the tes-

[* 384] tator John Osborne, or by the Defendants, *his executors, &c. in respect of the said vessel, and the Post Office salary, &c. since the 1st day of July, 1800; an account of what is due for principal and interest upon the said bond; and also an account of all other dealings and transactions between the said John Osborne and George Frederick Osborne, and the said Plaintiffs and Defendants, their executors, on the footing of the said declarations; and declares, that the moneys, which shall appear to have been received on account of the said vessel, &c. by the said John Osborne or by the said Defendants, his executors, on account of the said George Frederick Osborne or the said Plaintiffs, his executors, be applied first in payment of any money which on taking such account shall appear to be due from the said George Frederick Osborne to the said John Osborne on any other account than on account of the said bond, and afterwards in payment of the interest due upon the said bond; and

(1) 1 Bro. C. C. 543; see 547, 8.

that the surplus be then applied in reduction of the principal money due on the said bond.

1. How far the general policy of the law, in prevention of the sale of brokerage of offices, bears on the principal case, may be seen by reference to the statute of 49 Geo. III., c. 126. The previous laws with respect to the registration of British vessels are repealed, and the whole consolidated into one code, by the statute of 6 Geo. IV., c. 110, to which code some slight amendments have been made by the 25th and 26th sections of the 48th chapter of stat. 7 Geo. IV.

2. Where a transaction, contravening public policy, has taken place, relief may be given to a *particeps criminis*: see, *ante*, note 3 to *Dashwood v. Peyton*, 18 V. 27, with the farther references there given.

FORBES v. MOFFATT.
MOFFATT v. HAMMOND.

[ROLLS.—1811, FEB. 19; AUGUST 9.]

MORTGAGE not merged by union with the fee: the actual intention, not established by the acts of the party, presumed from the greater advantage against merger in favor of the personal representative (a).

A person becoming entitled to an estate, subject to a charge for his own benefit, may keep up the charge. Distinction upon this subject in Law and Equity: the latter sometimes holding a charge extinguished, where it would subsist at law; and sometimes preserving it, where at law it would be merged; depending on the intention, actual or presumed, of the person, in whom the interests are united. Where, as in most instances, it is, with reference to the party himself, of no sort of use to have a charge on his own estate, it will sink without some act by him to keep it on foot, [p. 390.]

Entry of the devisee, having also a mortgage, presumed to be as devisee, if no trace appears of any of the steps usually taken by a mortgagee to get into possession, [p. 391.]

Owner of a charge is not, as a condition of keeping it up, called on to repudiate the estate. His Election is, not to take the charge or the estate, but whether, taking the estate, he means the charge to sink, or continue distinct, [p. 391.]

Incapacity of infant to elect (b), [p. 393.]

In all cases of a charge merging it was perfectly indifferent to the party, in whom the interests had united, whether the charge should, or should not, subsist, [p. 393.]

By indentures of lease and release, dated the 7th and 8th of April, 1785, reciting the Will of Andrew Moffatt, that the sum of 27,000*l.* was due. to his estate from Aaron Moffatt; and that James Moffatt and Hindman, the executors of Andrew, had agreed to [* 385] lend the *farther sum of 12,000*l.* upon a mortgage of all the estates of Aaron Moffatt in Jamaica: to secure both the said sums, John Moffatt, the brother of Aaron, being a party, and agreeing to postpone a debt of 13,000*l.*, due to him by Aaron, to the

(a) Merger is not favored in Equity, and is never allowed, unless for special reasons, and to promote the intention of the party. The intention is considered in merger at law; but it is not the governing principle of the rule, as it is in Equity; and the rule sometimes takes place without regard to intention, as in the instance mentioned by Lord Coke, (Co. Litt. 54*b.*) At law the doctrine of merger will operate, even though one of the estates be held in trust, and the other beneficially, by the same person; or both the estates be held by the same person, on the same or different trusts. But a Court of Equity will interpose, and support the interest of the *cestui que trust*, and not suffer the trust to merge in the legal estate, if the justice of the case requires it. The rule at law is inflexible; but in Equity it depends upon circumstances, and is governed by the intention either express or implied (if it be a just and fair intention), of the person in whom the estates unite, and the purposes of justice, whether the equitable estate shall merge, or be kept in existence. 4 Kent, Com. (5th ed.) 102; 3 Preston, Conveyancing, 43-49, 314, 315, 557, 558: *Gardner v. Astor*, 3 Johns. Ch. 53; *Starr v. Ellis*, 6 Johns. Ch. 393; *Freeman v. Paul*, 3 Greenl. 260; *Gibson v. Crehore*, 3 Pick. 475.

(b) If the person in whom the estates unite be not competent, as by reason of infancy or lunacy, to make an election, or if it be for his interest to keep the equitable estate on foot, the law will not imply such an intention. 4 Kent, Com. 102, 103; *James v. Johnson*, 6 Johns. Ch. 417; *James v. Morey*, 2 Cowen, 246.

said intended advance of 12,000*l.*, in consideration of the said sum of 12,000*l.*, and to enable the executors of Andrew Moffatt to obtain an immediate security for the said debt of 27,000*l.*, Aaron Moffatt with the consent of John Moffatt conveyed to James Moffatt and Hindman, and their heirs, the plantation of Blenheim, &c. and all other the estates of Aaron Moffatt in Jamaica, subject to the payment of the sum of 12,000*l.* : and the same estates were conveyed to James Moffatt, Hindman, and John Moffatt, and their heirs, subject to the said mortgage for 12,000*l.*, and to a proviso for redemption on payment to James Moffatt and Hindman of 27,000*l.*, and to John Moffatt of 13,000*l.*

Aaron Moffatt died in 1797 ; having by his Will, dated in 1795, given all his property, real and personal, to his brother John Moffatt, and appointed him sole executor. John Moffatt died in 1807, intestate and without issue.

The Bill in the first cause was filed by Forbes and Elizabeth Moffatt, executors of James Moffatt, the surviving executor of Andrew ; praying an account as to the mortgage for 27,000*l.*, and a foreclosure ; charging, that John Moffatt, taking possession under the Will of Aaron, became the absolute owner of the premises ; that his mortgage was thereby extinguished ; and, the charge of 12,000*l.* being paid, the 27,000*l.* was the only subsisting mortgage.

The Defendant Sarah Moffatt, the widow of John, by her Answer insisted upon the mortgage for 13,000*l.* * as [* 386] still subsisting ; and prayed a sale, and an application of the produce to the two mortgages *pari passu*.

The Bill in the other cause was filed by Sarah, the widow of John Moffatt, and by his next of kin, against the Plaintiffs in the first cause, and against Elizabeth Hammond and Martha Bayard, the next of kin of John Moffatt, and his co-heiresses at law, in whom the legal estate was vested under the first mortgage ; praying an account with reference to the sum of 13,000*l.* and a foreclosure.

The acts of John Moffatt, from which his intention not to consider himself a mortgagee was collected, were possession taken upon the death of Aaron ; considerable expenditure upon the estate, and the sale of some parts ; the payment, as executor of his brother, of 5000*l.*, on the mortgage account, generally, without distinction of the two mortgages ; that sum exceeding by about 500*l.* the balance in his hands from the produce of the real estate : on the other hand, the registry of the mortgage deed in Jamaica, after the death of Aaron, was relied on by the personal representatives ; and accounts kept of the annual supplies and produce of the estate, entitled "the estate of Aaron Moffatt, deceased, in account current with John Moffatt."

The Bill in the second cause, alleged, that the mortgage deed was not recorded in the Island of Jamaica until after the death of Aaron Moffatt at his request ; that the estates, sold by John Moffatt, were not named or considered by him as part of the security ; and that the sum of 5000*l.* was paid only in part of the arrears due. The

answer relied on the general words, as comprising all the estates in the security.

[* 387] *Mr. *Martin* and Mr. *Trower*, for the Representatives of Andrew Moffatt, Plaintiffs in the first cause: Mr. *Leach* and Mr. *Horne*, for the Co-heiresses at Law of John Moffatt: Sir *Arthur Piggott*, Sir *Samuel Romilly*, Mr. *Heald*, and Mr. *Raithby*, for the other Parties, claiming his personal Property.

For the Representatives of Andrew Moffatt; and the Co-heiresses of John.—A mortgagee having acquired the Equity of Redemption, the effect is, that his interest ceases to be considered as a mortgage; unless by some clear act, equivalent to a declaration, he evinces his intention to keep alive the charge. The circumstance, that the original mortgage in this instance was of an equity of redemption, makes no difference; and the Court will treat it precisely as a legal estate under the same circumstances. The mortgagee taking the estate under his brother's Will, and having a right as between his own representatives to keep the charge still subsisting, which if he does not manifest that intention; would be considered as extinguished, they must show that intention. What third person here has a right to say, this is money? John Moffatt, being the only person responsible for this debt, the sole possessor of the funds applicable to its discharge, and continuing for several years to unite in his own person the characters of debtor and creditor, no rational purpose, for which he should wish the mortgage to exist, can be stated.

This does not, however, rest upon the accidental union of characters in the individual, but is confirmed by his acts. The acts of entering into possession, and selling parts of the estate, simply stated, though they may assist in forming the conclusion,
[* 388] are not *decisive; but possession taken, not in the usual way as a mortgagee, must be referred to the devise; and, as evidence of the intention to accept it, goes far towards the conclusion, that he did not mean the mortgage to continue: a conclusion confirmed by the sales which followed. If the possession could be referred to the mortgage, he would be a mere trustee for himself and the others: and can it be conceived, that any person holding possession as a trustee, would proceed to expend on improvements, not only the produce of the estate, but beyond that a considerable sum, his own property, without any communication with the *Cestui que Trust*?

With regard to the other fact stated, that he sold parts of these estates, conveying them in fee-simple, as mortgagee he could sell only subject to the equity of redemption. If it was necessary to show acts inconsistent with his character of mortgagee, these acts are directly so: but to these acts of John Moffatt are opposed, first, the accounts kept by him, and their title, "the estate of Aaron Moffatt, deceased, in account current with John Moffatt." This account, showing only the annual supplies sent out to the estate, and the produce, proves nothing inconsistent with the intention as between the representatives not to consider the mortgage as subsisting.

It was not unlikely, that the parties taking the estate might wish to see how that account stood. Uniting in himself the two characters of real and personal representative, he might conceive, that it was necessary for him to keep such an account, in case he should be called on by other creditors of Aaron. This, therefore, affords no evidence against the general rule, that, if an intention to keep alive the incumbrance is not manifest, the contrary must be presumed.

As to the payment of 5000*l.* whether solely out of * the [* 389] assets, as executor, or partly out of the rents, does not appear; instead of dividing that sum between the two mortgages in the proportions, in which they were entitled, he pays the whole into the Bank; and it does not appear, that afterwards he kept any account. That must be taken as a payment on account of the other mortgage; and is conclusive as to his intention, being in possession of the legal estate, as owner of the equity of redemption, not to keep alive his own mortgage; that he considered it merged in his other title, and the 27,000*l.* as the only subsisting mortgage. Being executor of Aaron, he had a right to retain as a creditor in equal degree. His conduct therefore in that instance is utterly inconsistent with the notion, that he was acting upon the strict principle of a mortgagee in possession.

With regard to the registry of the deed, the intention of all parties is clear, that this, being a family transaction, should be kept secret during the life of Aaron, lest the registry in Jamaica should disclose his embarrassments. As executor of Aaron, he was bound to do what Aaron ought to have done; and, though there were two mortgages, the deed was entire.

For the personal representatives of John Moffatt it was contended, that the sales and the payment of 5000*l.* the only acts giving any color to the inference, that he considered his debt as extinguished, afforded by no means a satisfactory conclusion: the sales being of parts not specifically included in the mortgage; and the payment being much less than was due from him, as personal representative of Aaron, liable to account for all his personal property; and that these equivocal acts were opposed by the clear acts of taking possession, registering the deed, and keeping the account, as mortgagee, and the impolicy * of relinquishing a specific [* 390] lien on a West India estate, giving a preference to all debts by simple contract.

Aug. 9th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—Under the circumstances of this case the question arises between the real and personal representatives of John Moffatt; whether the mortgage for the sum of money, due to him, is to be considered as still subsisting; in which case his personal representatives are entitled to it; or is extinguished by the union of the characters of owner and mortgagee in John Moffatt; or by any acts done by him after he became owner.

It is very clear, that a person, becoming entitled to an estate, subject to a charge for his own benefit, may, if he chooses, at once take the estate, and keep up the charge. Upon this subject a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished, where it would subsist at law; and sometimes preserve it, where at law it would be merged. The question is upon the intention, actual or presumed, of the person, in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and, where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot.

The first consideration therefore is, whether John Moffatt [* 391] has done any thing to determine that election which he undoubtedly had; if not, the question will be upon the presumption of Law under the circumstances of the case. It is disputed between the real and the personal representatives, whether John Moffatt took possession in his character of owner or of mortgagee. It must, I think, be taken, that he entered as devisee. There is no trace of any of the steps, that a mortgagee takes to get in possession. He sold parts of the estates, which, though not specifically named in the mortgage, were included in it by general words; and as to his keeping an account with Aaron Moffatt's estate, and therein crediting the produce of the devised estates, he could not with propriety do otherwise; for as they were subject to Aaron Moffatt's debts, the accounts must have been kept, until the debts were paid. But this, I apprehend, goes no way towards the decision of the question.

The owner of a charge is not, as a condition of keeping it up, called upon to repudiate the estate. The election he has to make, is not, whether he will take the estate or the charge; but, whether, taking the estate, he means the charge to sink into it; or, to continue distinct from it. The circumstance that John Moffatt caused the mortgage deed to be registered in Jamaica was relied on by the personal representatives, as showing an intention to keep the charge on foot; but the co-heirs say, that as the mortgage to Andrew Moffatt's estate was included in the same deed, it was the duty of John, as surviving trustee, to register it for the benefit of the *Cestuis que trusts*.

It is impossible to determine, upon which motive he acted: but I think this weighs something in favor of the personal representatives; for, though the deed, containing both mortgages, must have been registered, as it stood, yet, if acting merely for the benefit [* 392] of the owners of the 27,000*l.* mortgage, he might have entered some memorandum on the record, signifying that the other mortgage no longer subsisted. It is hardly to be supposed he could wish publicly to represent his estate as more heavily burthened than he really meant it to be.

The real representatives rely on the payment of 5000*l.* generally, without any apportionment of that sum between the two mortgages.

This appears to have been within about 500*l.* the whole balance at that time in his hands from the produce of the real estate; and the argument is, that, as he did not apportion that sum between the two mortgages, he must have considered his own mortgage as no longer subsisting. That, however, is far from being a necessary conclusion. He paid the sum, and took the receipt, as executor of his brother. The whole estate, real and personal, being in his own hands, it would not occur to him formally to set apart the same proportion of his own debt, that he paid to others. From his paying the interest of another mortgage it cannot be inferred that he meant to abandon his own. John Moffatt's acts therefore furnish no conclusive evidence of actual intention on the subject of this mortgage.

With regard to presumptive intention, it was evidently most advantageous to John Moffatt, that this mortgage should be kept on foot; for otherwise he would have given priority to the other mortgage and all the debts of his brother. The reasonable presumption therefore is, that he would choose to keep the mortgage on foot. Where no intention is expressed, or the party is incapable of expressing any, I apprehend the Court considers what is most advantageous to him. Upon that principle it was held in *Thomas v. Kemish* (1), that the charges should not sink; as that was *for the advantage of the infant; who, having attained [*393] the age of nineteen, had made a nuncupative Will, devising all, that was in her power to devise, to her mother. This could be of no avail, as an election by the infant; for she could make none. Her interest must have been the ground of the decision.

In the case of *Lord Compton v. Oxenden* (2) Lord Rosslyn says, "The cases of infants turn upon a supposed intent. The Court saw in *Thomas v. Kemish*, that it was much more beneficial to the infant that it should continue personal property; because an infant has the use and disposition of that before twenty-one; but he could have no disposable interest in a real estate till that age."

In *Wyndham v. The Earl of Egremont* (3) the limitation was to Lord Thomond for life, with remainder to trustees to preserve contingent remainders, to his first and other sons in tail male, and to his right heirs. Yet it was determined, that the charge should be raised for the benefit of his personal representatives. What the Counsel for the personal representatives contended was, that the charge should not merge; unless at some period in Lord Thomond's life it was indifferent to him, whether the term should be kept on foot or not.

Upon looking into all the cases, in which charges have been held to merge, I find nothing, which shows, that it was not perfectly indifferent to the party, in whom the interests had united, whether the charge should, or should not, subsist; and in that case I have already said it sinks.

(1) 2 Vern. 348.

(2) *Ante*, vol. ii. 261; see 264.

(3) Amb. 753.

There is a case of *Gwillim v. Holland*, referred to in *Lord Compton v. Oxenden*, which, I believe, is not reported any where; but which from the statement, given of it by the Counsel, who cite it, and by Lord Rosslyn [Loughborough], seems to be in point to the present. Mrs. Holland had a charge upon an estate, which she took by devise from her brother. He had made a mortgage on it. The Counsel say, Lord Hardwicke thought, that "was no merger; because it was more beneficial for her to take it as a charge." Lord Rosslyn says, the intervening incumbrance prevented the merger; and it was more beneficial for the person entitled to the charge to let the estate stand with the incumbrance upon it, than to take it discharged of the incumbrance, and give a priority to the second incumbrancer. Now it was certainly more beneficial for John Moffatt to let the estate stand with the incumbrance upon it than to give a priority to the other mortgage, and to all the debts of his brother Aaron. On the whole, therefore, I think, that the mortgage for 13,000*l.* must be considered as still subsisting for the benefit of John Moffatt's personal representatives (1).

WHERE there is no legal estate outstanding, but only an equitable charge, and the inheritance in fee simple comes to the person entitled to the charge, the general rule is, that the incumbrance is merged, unless the owner of the inheritance has manifested an intention that the charge should subsist; if the person entitled to the charge succeeded to an estate tail only in the estate, the presumption, supposing him to have evinced an explicit intention on the subject, will be, that he meant the charge not to merge: *Chester v. Willis*, Ambl. 246; *Duke of Chandos v. Talbot*, 2 P. Wms. 604. A court of law cannot look into equitable rights or beneficial interests; it merges estates lying in the same person, but cannot do so when they lie in different persons: equity does not regard that; but, without considering the subtleties of mergers, enters into the beneficial interests and the views of parties, whether the estates are strictly in the same person or in different persons. It is not a rule, that a charge upon an estate which can only be got at by trustees, and which, therefore, will not merge at law, should also be held distinct in equity, and go to the administrator, while the estate goes to the heir; but, where the owner has an absolute interest both in the estate and the charge, the charge is, in equity, annihilated, unless an intention to keep it up is clearly shown. To this doctrine, however, there are two exceptions: first, in favor of creditors, that they may not, by the merger, be deprived of what is justly owing to them; and, secondly, in the case of infants, who might exercise a power of testamentary disposition over the charge before the law would allow them to devise the estate: *Donisthorpe v. Porter*, Ambl. 600; *S. C.* 2 Eden, 163; *Powell v. Morgan*, 2 Vern. 91; and see, *ante*, note 3 to *Lord Compton v. Oxenden*, 2 V. 261, as also note 2 to *Ex parte Bromfield*, 1 V. 453. It should be observed that, although it is held, an incumbrance does not merge when the estate on which it is charged devolves upon the incumbrancer as tenant in tail, yet the rule is different where a tenant in tail *pays off* incumbrances affecting an estate over which he has the means of obtaining an absolute disposing power; in such a case (whether he takes an assignment or not), the debt is gone, unless there be evidence of his distinct intention that it should continue an incumbrance: see, *ante*, note 1 to *Shrewsbury v. Shrewsbury*, 1 V. 227.

(1) *Countess of Shrewsbury v. Earl of Shrewsbury*, *ante*, vol. i. 227, and the references.

WYKHAM v. WYKHAM.

[1811, MARCH 22, 23, 26; JULY 26, 30; DEC. 6.]

DEVISE, subject as to part to a devise to trustees and their heirs for debts in aid of the personal estate, and as to part to mortgages in fee, to sons and a daughter, and their respective issue male in strict settlement, &c.; with power to the sons respectively, when in possession, to convey or appoint all or any part to trustees on trust by the rents and profits to raise a rent-charge as and for a jointure for any wife or wives for each such wife's natural life only; and also to charge portions by deed, and to lease for twenty-one years. Execution of the power by conveyance to trustees and their heirs on trust by the rents and profits to raise and pay a jointure during the wife's natural life only; and charging portions; with covenant for title, and for quiet enjoyment by the trustees during the natural life only of the wife. As to the estate of the trustees at law, *Quere*; the Court of King's Bench certifying, that they took an estate in fee; and the Court of Common Pleas, that they took no estate whatsoever.

Recovery by tenant in tail, the tenants for life being dead, the mortgages outstanding, the debts unpaid, and the trustees for the jointure not parties, valid; as an Equitable Recovery, if those trustees took a fee: as to the equitable estates, viz. subject to the debts and mortgages, if an estate for life; and as to the legal estates, if a limitation in a deed can be reduced by implication, the circumstances, that the purpose did not require a fee, that it might disturb subsequent estates in the instrument creating the power, and the restraint of the covenant for quiet enjoyment to the wife's life, could not prevail against the legal effect of the limitation to the trustees and their heirs.

The proper mode of executing such a power is limiting a rent-charge to the wife by way of jointure, secured, if not by the ordinary power of entry and distress, by a trust term for ninety-nine years, with a proviso for *cesser* on payment of the jointure during her life, and all arrears at her death.

Distinction upon the execution of a Power in Law and Equity: a strict, literal, i. e. a due, execution the same in both; but, though void at Law, the substantial intention, upon meritorious consideration, enforced in Equity (a).

The Bill being dismissed, costs to the Plaintiff on account of the difficulty and novelty of the case refused.

Nonconformity of the nature of estates, raised by the execution of a Power, to those in the instrument creating it, is not of itself sufficient to reduce the legal effect of the latter instrument by reference to the former, [p. 416.]

Execution of a Power a limitation of a Use not requiring an immediately preceding estate of freehold, [p. 416.]

Equitable estates barred by equitable recovery, if there is an equitable tenant to the *Præcipe*, [p. 418.]

Equitable estate in remainder, though united with the legal fee in trust to secure the limitations, barred by an equitable recovery, [p. 418.]

Equitable Recovery, when nothing but equitable interests interposed between the legal estate and the ulterior equitable interest, [p. 419.]

Construction of an instrument, intended to be an execution of a Power, with reference to the instrument creating it, as operating to create an estate by way of Use, to be put in its proper place; in remainder for instance, the words importing an immediate conveyance; but the excess at law, the legal effect of words in a deed, beyond the occasion and purpose, not corrected, [p. 419.]

Term for ninety-years in a Will restrained to a life by implication from a subsequent limitation, not after the end of the term, but after the failure of that life, [p. 421.]

Of two inconsistent limitations in a Will the latter prevails, [p. 421.]

(a) Where there has been a defective execution or attempt at execution of a power, Equity will interpose and supply the defect, not universally indeed, but in favor of parties, for whom the person, intrusted with the execution of the power, is under moral or legal obligation to provide by an execution of the power. 1 Story, Eq. Jur. § 169 to 179; see 4 Kent, (5th ed.) 339-441; *Piatt v. McCullough*, 1 M'Lean, 69; *Schenck v. Ellingwood*, 3 Edw. 175; Jeremy, Eq. Juris. 376.

As to extending or reducing an express limitation in a deed by implication, *Quare*, [p. 422.]
Instrument, though void at Law, may be sustained in Equity, [p. 423.]

PHILIP, Lord Wenman, being seised in fee of real estates, and entitled in fee to the Equity of Redemption of other real
[* 396] estates * mortgaged in fee to Agatha Child, by his Will, dated the 4th of May, 1758, devised parts of his legal estates and parts of his equitable estates to George Harvey and Thomas Basset, and their heirs, upon trust, out of the rents and profits or by sale from time to time and also by a virtue of a power afterwards given to cut and sell coppice wood, to raise money sufficient to pay so much of the debts and legacies as the testator's personal estate would not be sufficient to pay (1); directing, that such part of the devised estates as should be unsold at the time his eldest son should attain his age of twenty-one should not be sold and disposed of without his consent; and in case his estates at Caswell, so given to his trustees, shall not have been sold, before either of his sons attain their respective age of twenty-one, empowering such of his said sons, who shall first attain that age, to sell and dispose of the said estates, or so much as had not before been sold; and he devised such parts of the said estates, which should remain after the said trusts should be performed, and all other his freehold manors, land, &c., whereof or wherein he was seised or possessed, or entitled to any estate in possession, reversion, &c., in the counties of Oxford, Kent, and Bucks, or elsewhere in England, to his eldest son Philip Wenman for life, without impeachment of waste; and from and after the determination of that estate by forfeiture or otherwise to trustees and their heirs during the life of Philip Wenman, to preserve the contingent estates after given; and from and after his decease to the first and other sons of Philip Wenman successively in tail male; with similar limitations, for default of male issue, to the devisor's younger son Thomas Francis Wenman for life, to trustees * and their heirs during his life,
[* 397] and to his first and other sons in tail male; remainder to the devisor's third and other sons in tail male successively; remainder, in default of all issue male, if the devisor should have any other daughter besides his daughter Sophia Wenman to his said daughter and such other or others in tail, as tenants in common; but if no other daughter than Sophia, then to her for life without impeachment of waste; with remainder to trustees and their heirs during her life, to preserve contingent remainders; remainder to her first and other sons successively in tail male; with remainders over to the daughters of his two sons and daughters respectively as tenants in common in tail, to his brother Richard and his first and other sons in tail male, to his daughters in tail as tenants in common, to the devisor's wife for life, and her first and other sons by any future

(1) The following clause, and some other parts of the Will, noticed in the Lord Chancellor's judgment, are not stated in the cases before the Courts of Law.

husband in tail male, and to her daughters in tail as tenants in common, with similar limitations to her sister and her children, and the ultimate remainder to the right heirs of the deviser.

The Will contained a charge for the daughters of his sons in the respective events of the limitations to the issue male of his daughter or the issue female of his eldest son taking effect, and the following proviso: That it shall and may be lawful to and for each of the deviser's said sons Philip Wenman and Thomas Francis Wenman, and every other his son, when and as they shall respectively become entitled to the aforesaid manors, lands, &c., or any part or parts thereof in possession by virtue of the devises and limitations aforesaid, from time to time to grant, convey, limit and appoint, all or any part or parts of the said manors, lands, &c., whereof they shall respectively be so seised and possessed, to trustees upon trust by the rents and profits thereof, to raise and pay any yearly rent-

* charge not exceeding 1000*l.*, by equal quarterly payments, clear of all outgoings and reprises whatever, as and for a jointure to and for any wife or wives that he or they shall hereafter happen to marry, for and during the term of each such wife's natural life only; the first payment to be made on the first of the four usual days as shall happen next after the decease of either of his said sons, who shall so limit, grant, or appoint any such rent-charge as aforesaid; and farther, that it shall be lawful for each of his said sons at any time or times after they shall respectively come into the possession of the said manors, &c., by any deed or deeds, &c., or by his or their Will or Wills respectively, to charge all or any part or parts of the said manors, &c., whereof he or they shall be so severally seised or possessed, with portions for daughters or younger children, namely, for one such daughter or younger child, 5000*l.*; for two 8000*l.*: and for three or more 10,000*l.*; with such maintenance, not exceeding 4 per cent. upon their respective portions as his son shall respectively by such Deeds or Wills appoint.

The Will also gave to the tenants for life, as they should come into possession, a power to lease all or any part of the said estates for any term not exceeding twenty-one years, reserving the greatest rent that could be obtained; and directed the renewal of college leases, to go with the real estate as far as the rules of law or Equity would allow.

By a codicil, the deviser expressed a wish, that the Caswell estate could be preserved; but directed, that in case of absolute necessity it should be parted with; and, if not disposed of, that the lease he held under Christ Church may be regularly renewed.

The * deviser died in August 1760, leaving the two [* 399] sons and the daughter named in his Will. Philip Lord Wenman, the eldest son, having entered into possession of the real estates at the age of twenty-one in 1763, by indentures, dated the 28th of June, 1766, previous to his marriage with Lady Eleanor Bertie, reciting the Will, and the powers to make a jointure and a provision for daughters and younger children, and his intended

marriage with Lady Eleanor, for making such jointure on her, in case she should survive him after the marriage, as he was empowered to make by virtue and according to the true intent and meaning of the said recited Will, pursuant to and by force and virtue of the said power, &c., conveyed and appointed to the Earl of Abingdon and John Morton all the estates devised to him by his father in the counties of Oxford and Bucks, or elsewhere in England, to hold to them and their heirs, upon trust by the rents and profits thereof to raise and pay to Lady Eleanor Bertie and her assigns during her natural life only the yearly rent-charge of 500*l.* by equal quarterly payments, clear of all outgoings and reprises whatsoever, as and for a jointure for the said Lady Eleanor Bertie, in case the marriage should take effect, and she should survive Lord Wenman, and to be in bar and satisfaction of dower: and for making provision for the daughters and younger children of the marriage, as he was empowered by the said recited Will, in pursuance of such power and every other power, &c., he charged all the said manors, &c., in the counties of Oxford and Bucks, subject to the said jointure, with the payment of the several sums therein mentioned.

The deed contained covenants by Lord Wenman with the trustees, that he had good right and full power to make such [* 400] grant, settlement, limitation, appointment, and * charge; and farther, that the trustees, in case the marriage should take effect, and Lady Eleanor should survive him, should from time to time after his decease during her natural life only, peaceably and quietly enter, possess and enjoy, the said manors, &c., before granted, &c., and receive and take so much of the rents and profits thereof as should be sufficient to pay the said yearly rent-charge of 500*l.*, without the lawful let, eviction, or interruption, of Lord Wenman, his heirs or assigns, or of any other person claiming under him, &c.

By indentures, dated the 26th of December, 1782, Lord Wenman in pursuance and farther exercise of his power under his father's Will conveyed and appointed to Lord Abingdon and Sir John Whalley, and their heirs, such parts of the estates in the county of Oxford as were devised by the late Lord Wenman, to hold to the trustees and their heirs, upon trust by the rents and profits to raise and pay to Lady Eleanor and her assigns during her natural life only the farther yearly rent-charge of 300*l.*, as and for an addition to the jointure of 500*l.* secured by the former deed, with similar covenants for right to make such grant, and for her quiet enjoyment.

By another similar indenture, dated the 1st of December, 1796, Lord Wenman in the same manner farther granted and appointed to Sir William Henry Ashhurst and Sir John Whalley Gardiner, and their heirs, such parts of the said devised estates as were situated in the county of Oxford, and in Pownden, in the parish of Twyford, in the county of Bucks, upon trust to raise and pay to Eleanor Lady Wenman and her assigns during her natural life only a

farther yearly rent-charge of 200*l.*, in addition to the jointure of 500*l.* and 300*l.* before settled on her with covenants similar to those in the former deeds.

Thomas Francis Wenman, the younger son of Lord Wenman the devisor, died without issue and unmarried in 1796, leaving his brother Lord Wenman surviving, who died without issue on the 26th of March, 1800; their sister Sophia Wykham having died in March, 1792, leaving two sons, William Richard Wykham and Philip Thomas Wykham, and a daughter Harriet Mary Wykham; who married Willoughby Bertie.

By indentures of lease and release, dated the 1st and 2d of January, 1799, William Richard Wykham conveyed to William Walford and his heirs his estate, expectant on the decease of Lord Wenman in the devised estates, in trust for William Richard Wykham and his assigns for his life, to bar dower.

William Richard Wykham being let into possession of the devised estates on the death of the last Lord Wenman, by indentures of lease and release, dated the 20th and 21st of June, 1800, all the estates in the counties of Oxford, Bucks, and Kent, were conveyed by Walford and William Richard Wykham, to make a tenant to the Precipe; and recoveries were suffered in Trinity Term 1800; in which William Richard Wykham was the vouchee. On the 1st of July, 1800, after the recoveries suffered, William Richard Wykham died, leaving Sophia Elizabeth Wykham his only child and heiress at law.

The mortgages remaining outstanding and unsatisfied, and the debts of Lord Wenman, the testator, unpaid, the bill was filed by Philip Thomas Wykham; insisting, that the estate in tail male, limited by the Will of Lord Wenman to the first and other sons of his daughter Sophia, * was not bound by the [* 402] recovery; and praying, that the Plaintiff may be declared entitled to an estate-tail in the devised estates, with the usual directions; and that the trustees in the jointure deeds may, without prejudice to Lady Eleanor Wenman or any other incumbrances, be directed to convey to the Plaintiff, &c. Lady Wenman died after the institution of the suit.

The Lord CHANCELLOR [ELDON] directed a case for the opinion of the Court of King's Bench upon the following question:

Whether the trustees, named in the deeds of appointment of the 28th of June, 1766, the 26th of December, 1782, and the 1st of December, 1796, or any of them, took any, and what, estate and interest in the manors, lands, and hereditaments, in question, of which Lord Wenman, the testator, was seised in fee-simple at the time of making his Will, and which were thereby given to Philip, his son, afterwards Lord Wenman, for life, or any of them.

The certificate of the Court of King's Bench (1) was, that the trustees, named in the deed of appointment of the 28th of June,

(1) *Wykham v. Wykham*, 11 East, 458.

1766, took an estate in fee in the manors, lands, and hereditaments, in question (being those, which were not limited to trustees for payment of debts and legacies), of which Lord Wenman, the testator, was seised in fee-simple at the time of making his Will, and which were thereby given to Philip, his son, afterwards Lord Wenman, for life.

When the cause came back for farther directions, a case was directed for the opinion of the Court of Common Pleas, [* 403] * stating the same question. The certificate of that Court (1) was, that the trustees, named in the deed of appointment of the 28th of June, 1766, and in the other deeds of the 26th of December, 1782, and the 1st of December, 1796, did not, nor did any of them, take any estate or interest in the manors, lands, and hereditaments, in question, of which Lord Wenman, the testator, was seised in fee-simple at the time of making his Will, and which were thereby given to his son Philip, afterwards Lord Wenman, for life, or any of them.

The cause came on for farther directions.

Mr. Richards, Sir Samuel Romilly, Mr. Fonblanque, and Mr. Bell, for the Plaintiff.—Upon these conflicting certificates of two Courts of Law this case comes back for decision in this Court. The Plaintiff, to whom the certificate of the Court of King's Bench opposes considerable difficulty, conceived it to be apparent from the instruments, that the second Lord Wenman, executing the power, intended to give the trustees an estate *pur autre vie*: that though certainly an estate passed, the authority to appoint a larger estate than that is doubtful. A mode, by which it is admitted the object might have been executed, and which would have been more convenient, was not attempted: but the question must depend upon what the parties have done. The intention to create fees upon fees, so as to exclude the estates of those parties, who were to give jointures in succession, would be so improper in many cases, that it cannot be supposed; and it is difficult to conceive the principle, upon which the Court of

Common Pleas held, that no estate whatsoever passed: a [* 404] conclusion, that can * arise only from the supposition, that this was the limitation of a use, not the execution of a power; as to which, if the intention to execute appears, what words are used is immaterial. The words are applied to what the Court had the capacity to do; and in the construction of instruments executing powers there is no essential difference between one instrument and another: the intention alone is regarded. The intention of Lord Wenman to execute his power, and give a legal estate to the trustees, cannot be the subject of doubt. They are to enter, and take the rents, &c. The Plaintiff says, that it is impossible to maintain, that by this execution of the power no estate passed to the trustees; that the intention to pass the legal estate is clear; but upon a fair view of the documents it must be confined to an estate

(1) *Wykham v. Wykham*, 3 Taunt. 316.

pur autre vie. The word "heirs" is not alone sufficient to show the intention to give a fee. Taking the power to extend only to give an estate for the life of his wife, that word was essential, to guard against the possible event of the death of both the trustees during the life of the *Cestui que vie*.

For the execution of a power no particular form of words being necessary, the covenant, that the trustees shall quietly hold and enjoy during the natural life only of Lady Eleanor, would alone be a sufficient execution; under which the trustees would take only an estate *pur autre vie*: then can the intention, appearing in the former part of the Will, to go farther, and to give a fee, which he had no power to give, invalidate that, which otherwise would be a good execution.

Another view of the case is, that this is a good execution, if not at Law, in Equity; good, as far as the party had power, and void only for the excess: good, therefore, as to the equitable estate; and then the recovery would be void certainly; as the person, having the equitable *estate for life, ought to join in the [* 405] recovery: but the answer is, that, being the grant of an estate during the life of Lady Wenman, it is a good execution at Law.

The argument, that a chattel interest only was given, is founded on *Cordall's Case* (1), and others, that followed it; which have no application: that being an indefinite devise to executors, until debts should be paid: this an estate expressly to trustees and their heirs. To bring this within those authorities, the latter words must be rejected. It is difficult to give the executors an estate in opposition to those words. It is also difficult to maintain, that this is a power to appoint a fee. The usual mode of jointuring in practice is to limit a rent-charge to the wife, creating a term of ninety-nine years in trustees to secure it; but the power under this instrument, to grant or appoint all or any part of the manors, &c. to trustees, upon trust by the rents and profits to raise and pay a rent-charge, clear of all outgoing and reprises, could not be executed in that mode. Those terms cannot apply to a rent-charge; which must be subject to the land-tax and other outgoing, with all the variations incident to them.

The mode of execution, therefore, must be a conveyance of some species to trustees, upon trust to raise an annual sum. If, as the Plaintiff contends, a fee could not be appointed, there are only two modes of executing this power: the creation of a term for years, or a freehold estate determinable with the life of the lady, whom the devisee should marry, upon trust to raise a rent-charge; and the latter is the interest, which the Plaintiff represents as the true result of what Lord Wenman has *done. If the [* 406] true construction is, that the estate is to determine with the life of Lady Wenman, the possibility of arrears existing at her decease does not afford an argument against it.

(1) Cro. Eliz. 316, cited 8 Co. 96.

The Court will be anxious to give effect to the intention, thus particularly declared, to execute the power. It is perfectly clear, that he did not mean to give a term of years. The grammatical construction of the trust, as it is expressed, is to raise the charge during the life of Lady Wenman; and the strong inference from that expression is fortified by the covenant, that follows.

In *Venables v. Morris* (1) Lord Kenyon observes upon *Coryton v. Helyer* (2), not with disapprobation, that Lord Hardwicke supplied the words, "if he so long live" in the bequest of a term of ninety-nine years, as necessary to effectuate the intention. The case of Doe on the Demise of *Compere v. Hicks* (3) was also upon a Will; but in *Curtis v. Price* (4) a remainder in fee to trustees in a settlement was upon the manifest intention limited to the life of the tenant for life. In the construction of every instrument, deriving its effect from the Statute of Uses (5), a Court of Equity leans as much as possible in favor of the intention. The argument of Peere Williams upon the case of *Tomlinson v. Dighton* (6), is a very able exposition of the view, which the Law takes of an instrument executing a power. The whole of this deed shows clearly, that it never was intended to operate as an unqualified conveyance of the fee-simple; but, admitting it to have that effect, a decision, that the

covenant for quiet enjoyment is not a good execution of [* 407] the power, would shake the * foundation of the law of real property, settled for two hundred years. That covenant is at least as strong as the covenant to stand seised to uses; which is one of the cases referred to (7) in *Tomlinson v. Dighton*. The conclusion from all the authorities is, that no particular words are necessary for the execution of a general power of appointment. In *Commons v. Marshall* (8) the case is put by Counsel of a man, reciting his power to lease for twenty years, and granting a lease to hold for forty years, as void only for the excess. That case, which is distinguished from *Cambell v. Leach* (9) by that express recital of the power, has never been contradicted by any decision. In the *Earl of Darlington v. Pulteney* Lord Mansfield says (10), where a power has been exceeded, a Court of Law may interfere, and qualify it, upon the intention, clearly expressed, to execute the power.

Sir Arthur Piggott, Mr. Leach and Mr. Shadwell, for the Defendant.—The authority of both the Courts of Law is opposed to the Plaintiff's proposition, that in effect, though not in terms, an estate was created for the life of Lady Wenman: but the Defend-

(1) 7 Term Rep. 342; see 347.

(2) Since reported, 2 Cox, 340; cited 2 Ves. 195.

(3) 7 Term Rep. 433.

(4) *Ante*, vol. xii. 89.

(5) Stat. 27 Hen. VIII. c. 10.

(6) 1 P. Will. 149.

(7) 1 P. Will. 166.

(8) In the House of Lords, 24th Feb. 1774; 6 Bro. P. C. by Toml. 162.

(9) Amb. 740.

(10) Cowp. 267.

ant contends, that the latter certificate is right ; that here is no execution of this power. The power, given to the tenant for life, is not more extensive than the immediate purpose of the devisor in this proviso requires ; and, if any mode can be pointed out, that will answer that special, limited purpose, consistent with the main leading objects of the Will, not defeating any * estate of freehold, or converting any legal estate into an equitable, interest, that upon every principle, particularly those, which apply to Wills, must determine the construction ; and any other construction, the effect of which must be displacing estates of freehold, converting estates of one description to another, thereby introducing confusion, and entirely defeating what may be considered rather a family settlement than a Will, would, if not the effect of strict necessity, be a violation both of principle and authority. The principle, uniformly regulating these cases, is what is necessary to make the Will effectual. Upon that principle the limitation to a man and his heirs has been held to pass the fee, or limited to an estate for life only, as the intention would be best carried into effect. [* 408]

Applying that principle, can this devisor be considered as intending by giving these powers to abridge the estates devised ; to take the freehold, legal or equitable, from those, who would have had it as tenants for life ? Is not the necessary inference rather, that nothing more was intended than a chattel interest ; by which the object would be even more completely effected ; and which would be perfectly consistent with every limitation in the Will, instead of displacing estates, and defeating many of the powers given ; a construction not to be implied from any of these provisos, and least of all from that for raising a jointure ? The office of a proviso is, not to defeat what has been done by the instrument, in which it is contained, but to modify it by introducing something not inconsistent with the preceding part. The language is plain, as the intention is natural, that the persons, to exercise these powers successively, shall be in possession of the estates. The powers are given equally to all ; and the acts are to be done, when and as they shall be respectively seised and * possessed. Is the power to charge portions for daughters, however necessary, to be suspended, when the proviso does not contain a word importing any thing beyond a chattel interest ? This devisor, who appears perfectly competent to limit legal estates, aware of the distinctions as to contingent remainders, &c. could not have been at a loss to express an estate *pur autre vie*, or in fee simple, where he intended either. In such a Will why is the Court to supply words of inheritance without any necessity, and with the effect of defeating legal and equitable estates ? All, that is required for the trust expressed, to raise a jointure by the rents and profits, is a chattel interest determinable upon the death of the wife and payment of all arrears. Thus by creating a legal estate for a term of years the words are precisely followed ; a right to the possession is given for this purpose ; the end is completely answered, without giving or displacing, any estate of

freehold ; and all the inconveniences, that have been mentioned, are obviated. The power, which is not limited to one jointure, for one wife, might thus be exercised again, subject to the existing term ; according to the clear intention, that each of his sons, tenant for life or in tail, should on coming into possession of a legal or equitable estate have these powers ; that the disposition under them should go no farther than the purpose of paying the jointure, &c. ; and should cease, when that object was completed. Upon the other construction any farther exercise of these powers would be impracticable. The party to exercise them could not be seised and possessed. The terms, in which the power is created amount to demonstration of the object, that it shall be so exercised as not to disturb the future rights of that, or any other son, tenant for life or in tail. There is a direction to renew college leases ; affording additional evidence of the intention, that none of these estates shall be disturbed, or the nature of them altered, by the execution of this power. A mere chattel interest will without producing that effect sufficiently secure the end : while a freehold estate must without any necessity defeat many of the leading objects of this Will. That, as the root of the power, must determine the construction ; not the instrument executing it ; which instrument, however, does not necessarily import an estate *pur autre vie* ; on the contrary, the purpose would not be answered, unless the trustees have an interest extending beyond the life of Lady Wenman. The trustees could not under the covenant enter after her death for the arrears then due.

The intention is to be collected, not from the particular purpose merely, but from the whole instrument, clearly showing, that the general estate of the trustees had no object beyond that special purpose ; as in *Curtis v. Price* (1). The proposition, that a lease for forty years under a power to lease for twenty is good, as against the remainder, for twenty years, rests only upon the statement of Counsel in the case before the House of Lords. The Court gives to a general limitation such effect as will accomplish the purpose ; but, if that can be accomplished in more ways than one, takes care, that it shall have effect in that way, which will be consistent with the intention declared in other respects. That, which is the rule as to an instrument executed, must prevail, where it is merely executory. Which mode will be most consistent with the declared intention and the other objects of this Will ? A conveyance to the trustees in fee would displace estates and defeat powers, expressly given. An estate *pur autre vie* would equally interfere with the declared purpose ; interrupting the legal term of the second tenant for life, and abridging the power to suffer a recovery. A chattel interest, the most familiar mode in use, answers the purpose ; and leaves all beyond it untouched.

(1) *Ante*, vol. xii. 89.

As to the equitable estates, those limited to the trustees for sale, and those in mortgage, the same reasoning applies.

Dec. 6th. The Lord CHANCELLOR [ELDON].—This case came before me for the purpose of having directions given, the nature of which would depend altogether upon the validity of the recoveries suffered of different estates, of which Philip Lord Wenman was previously to the 4th of May, 1758, seised in law or in equity; and the estates, with reference to which the question arises, may be divided into two classes: estates, of which he was seised of the equity of redemption in fee, subject, as I understand the facts of the case, to mortgages in fee; and estates, of which he had the legal estate in fee, subject to no incumbrance whatsoever. These two classes of estates may farther be subdivided: some of those, of which he was seised of the equity of redemption, being devised upon certain trusts in his Will; and some also, of which he was legally seised in fee, being devised upon certain trusts in his Will. He had therefore after the execution of his Will, if I may so express it, four species of estates: equitable estates, devised by him for the payment of debts and legacies; equitable estates in other lands, devised, not for that purpose, but to the other uses and limitations of his Will; estates, of which he was legally seised in fee, which he had devised for the payment of debts and legacies; and estates, of which also he was legally seised in fee, devised not for * the payment of debts [* 412] and legacies, but for the other uses and purposes of his Will.

When this case was originally heard, it seemed to me, as I then apprehended with the concurrence of the Bar, not to be inexpedient to state a case to a Court of Law as to the effect of the recovery suffered of those estates, of which the devisor was legally seised in fee: and I take it to be clear, as put by Sir Arthur Piggott, that, if this instrument, according to the opinion of the Court of King's Bench, conveyed an estate in fee, or according to the opinion of the Court of Common Pleas, no estate whatever, these recoveries must be good. If it conveyed an estate in fee, the recovery is good upon the principle, that all the beneficial interests are equitable estates. If it conveyed no estate whatever, no estate was interposed with respect to the document creating a tenant to the *Precipe*, or any other document, that could be of any force or effect in the decision of this question.

It became necessary, therefore, for those, who were to contend, that these recoveries did not bar the estate tail and remainders in all or some of these estates, to insist, that the opinion of the Court of King's Bench, which maintained, that this instrument created an estate in fee, was wrong; and also, that the opinion of the Court of Common Pleas, that it conveyed no estate, was erroneous; that according to the true construction of the instrument it did create an estate, which stood in the way of the validity of the recovery; and that, it was contended, must be by creating either a rent-charge,

with a chattel interest in the trustees, to be raised by implication, in order to secure that rent-charge, or an estate for the life of Lady Wenman, upon looking at the whole of the instrument, considering its nature, and attending to every part of its text; admitting it, as it must be admitted, to be, not a Will, but a Deed.

A fact, stated upon each of the cases sent to the Courts of Law, is, that the debts are not paid; and in the Will itself there is a peculiarity, not noticed in the cases, of this sort; that after this devise to the trustees upon these trusts the deviser proceeds to direct, that such part of the messuages &c. so given to the trustees, as shall be unsold for the purposes therein mentioned at the time his eldest son shall attain the age of twenty-one, shall not be sold or disposed of without his consent or approbation. That clause does not take the estate out of the trustees; merely restraining their power of sale without his consent; but still the estate would remain in them. There is a subsequent clause, with respect to the estate of Caswell, which in a codicil he expresses a great anxiety to preserve in the family. He gives to his son a power to sell and dispose of that estate; and, as I think the estate, vested in the trustees, is not destroyed by the check upon their power of sale, requiring the approbation of the son after his age of twenty-one, so the concurrent power given to the son, of selling the Caswell estate does not appear to me to destroy the estate devised to the trustees.

The effect of the devise of such parts of the estates, devised to the trustees, as should remain after the trusts should be performed, and all other his estates, &c. to his eldest son for life without impeachment of waste, is, as it appears to me, looking back to the case of *Lord Bath*, which, though it certainly never received judicial decision, was the subject of great consideration among some very eminent men and judges, now deceased, that, as with respect to the estates, which were in mortgage, forming part of the subject of this devise, of course the late Lord *Wenman could only be equitable tenant for life of them, so with respect to those estates of which his father was seised in fee, and which are thus devised to the trustees, the effect would be to vest the legal estate in them, and an immediately commencing, concurrent, equitable estate in the tenant for life, with equitable remainders over, subject to the charges, which the trustees by the application of the legal estate were to work off from the equitable interest.

I observe, that under the words "divers remainders," stated in the cases sent to the Courts of Law, is included, after limitations to the daughters of his sons and daughter, and to his brother and his children, a particular devise of all his estates to his wife for her life, with remainder to her first and other sons.

The Will is very inartificially drawn. From one part of the argument I concluded, that some terms for years had been created; but I can find none. Adverting to the circumstance, that he had made his sons tenants for life, and inserted a limitation to his own

after-born sons in tail, the devisor provides leasing powers for the tenants for life and those possible tenants in tail; and, contemplating what might be convenient with a view to a provision for the wives and children of his sons, inserts these provisoes; having in certain events by his own Will provided personal fortunes for the daughters of his sons in possession, not by way of creating an estate, but, as in this proviso, by way of charge; in the one case actually charging, in the other giving the power of charging, I am not surprised, that any one attempting to execute this power, should have considerable difficulty how to do it. He could not get far wrong in equity; as, being for meritorious consideration, it would do in equity in almost * any form, in which that intention was clearly [* 415] expressed. I say, it would do in Equity; as, although the phrase is frequently met with in the Common Law Reports, that what is not a good execution of a power at law cannot be a good execution in equity, if by that is meant, that what cannot be sustained as a good execution of a power at law, cannot be sustained in equity, I do not agree with that interpretation. Though not a good execution of a power any where, it may be that, which a Court of Equity will take care to have executed. I therefore agree with Lord Redesdale, with the same deference expressed in his observations (1) upon Lord Mansfield's language in Burrow's Reports; not admitting as doctrine to be maintained, that what a Court of Equity will substantially support, as a good execution of a power in equity, is therefore a good execution at law; notwithstanding, it is confidently there stated, that there can be no difference in the execution of a power at law and in equity. If it is to be understood a strict literal execution, viz. that it was duly executed, that must be the same both in Courts of Law and Equity: but that a Court of Equity will enforce the substantial intention of the person executing, where a Court of Law cannot deal with it, is, I apprehend, extremely clear.

This power is to grant, convey, limit, and appoint to trustees, without saying to them and their heirs or their executors: leaving the nature and quantity of the estate they were to take open to the construction of the person, who was to execute the power. There was nothing, which could determine, what he was to do, except by reference to the instrument, out of which the power arose, the estates contained in that instrument, and the purposes, for * which the power was given. With respect to the instru- [* 416] ment, out of which the power arose, if the nonconformity of the nature of the estates, raised by the execution of the power, to the estates expressed in the instrument, by which the power is given, is of itself a ground to say, that the person executing the power, has not attempted to give a larger estate, and ought to cut down the legal effect of the instrument, and make it what it ought to be according to the intention and the nature of the instrument, out of which

(1) See Lord Redesdale's observations, 1 Sch. & Le Froy, 66 to 71, in *Shannon v. Bradstreet*, upon *Zouch v. Woolston*, 2 Burr. 1136; *post*, vol. xix. 13, 22.

the power arises, how are we to account for many cases, where the execution was capable of being so corrected by reference to the instrument, but was not so corrected?

With respect to the purposes, they were capable of being executed in different ways. The estate of Lord Wenman was a present estate for life. The estate of the trustees to preserve contingent remainders, if it came into existence by forfeiture or other determination of his estate in his life-time, was an estate in remainder, as to its duration concurrent with his estate for life. The purpose, therefore, was one, which did not require a grant of an estate immediately to take effect in possession: nor did any doctrine of law require that with reference to the purpose; as, the execution of the power being the limitation of a use, an immediately preceding estate of freehold was not necessary to such a grant; and the strong inclination of my mind is, that the mode of executing this power, which, if the devisee had merely entered into a covenant, this Court would have decreed, is by limiting a rent charge to her by way of jointure; which are the very words of the power; securing that rent charge, if not by the ordinary power of entry and distress, by a term, vested in trustees for ninety-nine years, if she so long live; or rather not expressly if she so * long live, but with a proviso for cesser of the term on payment of 500*l.* per annum during her life and all the arrears due to her at her death; and that would not have gone to disturb any of the uses after mentioned.

The mode, however, in which this power has been executed, is by the deed of the 28th of June, 1766, creating a jointure for the lady, whom the eldest son married, and the subsequent instruments increasing that jointure. In the first deed he covenants, that he had a right to make such grant; and that the trustees should be at liberty during her life to enter, and take as much of the profits as would be sufficient to answer the jointure; but I do not perceive, that there is any covenant with respect to the right to charge the portions.

The question then is, whether under these circumstances this recovery is good in law as to all, or any, and which of the estates, comprehended under the different descriptions I have stated, which the testator had in the year 1758; as to those estates, of which Lord Wenman, the son, was under the settlement tenant for life in Equity, comprehending the estates in mortgage, either comprised, or not, in the devise to the trustees for the payment of debts; and with respect to the estates, of which Lord Wenman, the deviser, was seised legally in fee, his son, I apprehend, was only equitable tenant for life of such of those estates as were comprehended in that devise to the trustees; and the consequence of that appears to me to be, that Lord Wenman, the son, and all persons, who were to take after him under the effect of the Will, or of any instrument dealing with the estates they take under the Will, were, as to such classes of estates, only equitable tenants for life or in tail.

[* 418] I take it to be now clearly settled, that equitable es-

tates will be barred by an equitable recovery, if there is an equitable tenant to the *Precipe*. In the case of *Botcler v. Allington* (1) I well remember a subject of considerable doubt, where the first estate was a legal estate in fee in a person, having also an equitable estate in remainder under the limitations, to be secured by that legal estate, whether the owner of a prior equitable estate tail could bar that equitable remainder; as it was supposed to knit itself to, and be merged in, the legal estate vested in the same person; but in the case of *Brydges v. Brydges* (2) Lord Alvanley gives a very able judgment upon that point; reasoning it extremely well. Lord Kenyon says in one of the cases cited (3), that *Botcler v. Allington* was an amicable suit: but, whether it is so to be considered, or not, and admitting that Lord Alvanley has reasoned well, and comes to the right conclusion upon that point, I can take upon myself to say, that both the Bar and the Bench were a good deal perplexed with that case.

If this is so, it does not appear to me, that any objection can be maintained against these recoveries, as far as they apply to the estates, of which Lord Wenman was so tenant in equity, in any way of considering the effect of the execution of this power. If it created an estate in equity in fee, it could only create such an estate, giving the beneficial interest to Lady Wenman, as far as she was entitled to the rent charge; leaving all the rest of the beneficial interest just as it was. If, according to the Court of Common Pleas, it created no estate whatever, it would interpose no objections to the recovery. If it created only a chattel interest, there is no objection to the recovery; * as then it did not deal with the freehold. If, [* 419] on the other hand, it created an equitable estate for life in the trustees, still it would be an equitable estate for life, which, being clothed with a trust to pay the annuity, and the ulterior trust in Equity being for those, who were afterwards to take vested estates, it is, I apprehend, in the power of those, who have the substantial equitable interest where there is nothing but equitable interests interposed between the legal estate and the ulterior equitable interest, to suffer an equitable recovery. In the great case upon the estate of Mr. Bowes that was much discussed; and I think that the true doctrine with respect to equitable recoveries.

Then as to those, that are legal estates, I repeat, that if this creates an estate in fee, it forms no objection to the recovery. If it gives no estate, there is no objection to the recovery. It may operate differently at Law and in Equity; that is, if, according to the opinion of the Court of Common Pleas, it gives no estate at Law, it does not follow, that it would not raise, I do not say an estate in

(1) 1 Bro. C. C. 72.

(2) *Ante*, vol. iii. 120; see 126. Upon the distinction, here alluded to, that, to produce merger, the legal and equitable estates must be co-extensive and commensurate, Lord Alvanley decided the case of *Williams v. Owens*, *ante*, vol. ii. 595; upon which decision, see the note, 606.

(3) 7 Term Rep. 437, Doe on the demise of *Compiere v. Hicks*.

Equity, but a right to have an estate created in Equity. If, on the other hand, it gives at Law an estate for life in the legal estates, it is then said the objection is formidable. I therefore come now to consider that part of the case.

First, the conveyance purports to be an immediate conveyance; but where an instrument is intended to be an execution of a power, I should struggle extremely to get out of the effect of immediate words of grant, and make the instrument operate to create [* 420] an estate, which I * could put in its proper place; that is, in remainder; considering it as operating to create an estate by way of use. This instrument is to be considered in two ways; with reference to itself, and to the instrument giving the power, which the other purports to execute: but, if an instrument, which purports to be the execution of a power, does convey in language, the legal effect of which goes beyond the power, I cannot find, that you look to the instrument, in which the power is given, in order to correct the excess at Law. If you look to the executing instrument itself, it purports to be a grant in fee; and it is a deed. It purports to be a grant in fee for purposes certainly not requiring a fee: but still it purports to be a grant in fee: and it is, I think, difficult to maintain, that, if a man does more by using words, which have a legal effect, than is necessary to execute the purpose he professes to execute, the circumstance, that he uses those words of larger legal effect than is required, and his purpose, shall cut down the legal effect of the words in a deed.

Another circumstance has been relied upon, and fairly relied upon; that is the covenant: but where a person, executing a power, has infinite difficulty, considering the language, in which the power is given, to know in what way to create the estates, which are to be created, it is going much too far to say, that having in fact given a larger estate than was necessary, as they covenant for quiet enjoyment only during the time necessary to answer the beneficial interest, that covenant shall cut down the legal effect of the grant. That, I apprehend, cannot be made out; nor is it made out by any of the cases referred to.

[* 421] *In *Coryton v. Helyar* (1) Lord Hardwicke thought himself authorized to construe the limitation to the testator's son of a term for ninety-nine years, as if it had been for ninety-nine years if he should so long live. I notice that case, observing, that in *Jones v. Morgan*, Lord Mansfield lays great stress upon it: declaring in the most explicit language, that there was no necessity in that instance for implying those words; and Lord Kenyon says (2) in *Venables v. Morris*, that there was an absolute necessity for that implication. The reason, given by Lord Hardwicke for that implication in a subsequent case, where *Coryton v. Helyar* was cited (3), is, that it was a trust estate. In a note I have seen of his judgment

(1) 2 Cox, 340; Mr. Cox's Report was published since the decision of *Wykham v. Wykham*.

(2) 7 Term Rep. 437.

(3) 2 Ves. 195.

his Lordship says, there is no absolute, but there is a probable, necessity for it; and (see how sensibly he reasons it) that there was from all the rest of the Will an implication so probable, that the mind could not resist it; and he inferred, that the term was to endure only during the life of the son; as the subsequent estate was limited expressly, not after the end of the term, but after the decease of the son. Then he says, that, if the term in the first part of the Will was absolute, it is cut down by the subsequent limitation, which is to commence immediately upon the decease of the son; destroying so much of the absolute limitation as is inconsistent with that. Lord Hardwicke therefore puts it upon the doctrine, prevailing in all times as to Wills, that, where there is a subsequent limitation, inconsistent with a former one, and an estate created afterwards, that does by necessary implication in that sense cut down the effect of the former limitation. * The case of [* 422] *Coryton v. Helyar* therefore does not affect this case.

I observe in *Venables v. Morris* (1) Lord Kenyon had a good deal of difficulty to say, that those words "to trustees and their heirs" would not create a fee; and accounts for it in a subsequent case (2), not by expressing an opinion, that the estate could not be abridged even in a deed, but thus; that in that case he thought it necessary, as the Master of the Rolls in a subsequent case (3) seems to consider it, that the trustees to preserve contingent remainders should have an estate in fee on account of the Power of Appointment the wife had. If that observation is duly applied to that case, the question becomes very material, whether on account of such a power a limitation in a deed is to be construed to import less than it expresses; a question, which I cannot represent as quite settled.

If the ground, upon which it is there represented to be necessary to consider the estate as an estate in fee, can be supported upon looking to the cases, which perhaps is not quite to be admitted, considering, that there was, prior to that power, an estate tail actually vested in the wife herself, subsequent to the limitation to those trustees, by virtue of which estate she would have been entitled to call for a conveyance from the trustees, it appears to me very difficult to maintain the point, that in a deed this doctrine of implication is to be so applied. Without, however, presuming to say, that it is not, is it to be applied to a deed containing no other grounds for the implication than are to be found in this deed? Where that implication was made in judgment, there were many estates limited, subsequent to that estate to the trustees * and [* 423] their heirs; estates to the trustees themselves during the lives of other persons. There is nothing of that kind in this case; and, unless I can infer, that the estate, given in this instrument to trustees and their heirs, is not a fee, as it is not necessary to give a fee for the purpose, for which the instrument is executed, and as there is a covenant for quiet enjoyment only during the life of the

(1) 7 Term Rep. 342.

(2) 7 Term Rep. 437.

(3) *Curtis v. Price*, ante, vol. xii. 89.

wife, and as it may disturb the estates, which are subsequently given in the instrument creating the power to give this estate, I cannot cut down the legal effect of this limitation to the trustees and their heirs.

I do not consider, whether the execution of this power is void at law. My opinion is, that Lady Wenman would have been clearly entitled to her jointure in equity: but it does not follow, that she would therefore be entitled at law; as I do not agree, that an instrument is to be taken to be void in equity, because it is void at law, and that, as it can have no effect at law, therefore it can have no effect in equity; and upon this very case, according to the judgment I have no difficulty in pronouncing, supposing that this is good for nothing at law, according to the opinion of the Court of Common Pleas, that the instrument conveyed no estate whatsoever, much, as I respect the general *dicta* of Lord Mansfield, I think it so far substantially good in equity, that, if Lady Wenman was alive, they must make good to her an estate, that would secure her jointure. My opinion, therefore, upon the whole case is, that these recoveries are good.

The Bill was dismissed.

An application for the Plaintiff's costs out of the estate, on account of the difficulty and novelty of the case, was refused; Sir *Arthur Pigott* observing, that it was impossible to give costs to the Plaintiff, whose Bill was dismissed (1).

1. As to the jurisdiction of equity to aid legal defects in the execution of powers, see, *ante*, note 1 to *Bull v. Vardy*, 1 V. 270; but no execution of a power, however correct in point of form, will be supported in equity, when it is attempted to be applied to purposes clearly and obviously foreign to those for which it was originally intended: see note 2 to *M'Queen v. Farquhar*, 11 Ves. 467.

2. It has been repeatedly held of the utmost importance, to preserve a strict analogy between legal and equitable estates, with respect to the power of suffering recoveries; and, indeed, in all other respects; as it would destroy the whole harmony of the laws of real property, if the legal estate were governed by one set of rules, and the equitable estate by another: *Marquis Cholmondeley v. Clinton*, 2 Jac. & Walk. 148. Sir Wm. Grant, however, without disputing the propriety of observing this analogy generally has expressed an opinion that it does not hold in all cases: see note 4 to *Pigott v. Waller*, 7 V. 98. As to the doctrine of equitable recoveries, see the notes to *Brydges v. Brydges*, 3 V. 123.

3. As a general rule, whenever, in the execution of a power, something *ex abundanti*, has been improperly attempted, which, however, can be clearly separated from what is regular, that excess may be corrected, without setting aside the whole appointment; but there are cases in which the attempt to do more, by virtue of a power, than the policy of the law allows, will vitiate the whole execution, even as to those particulars which, if they had stood alone, would have been good: see note 1 to *Bristol v. Warde*, 2 V. 336.

(1) See an instance, *Cranch v. Brisset*, mentioned *ante*, vol. v. 398, where, as a Bill was necessarily to be filed by some person, Sir Thomas Sewell ordered the Costs to be paid out of the Fund; though he felt himself obliged to dismiss the Bill. *Lewis v. Loxham*, 3 Mer. 429, and the note, 430; Beames on Costs, 231. No Costs to Relator, the Information being dismissed: *Attorney General v. Oglander*, *ante*, vol. i. 246. As to Costs of Heir, Defendant, failing, see *ante*, vol. i. 205, and the note.

RANDALL v. MUMFORD (1).

[1811, Dec. 6.]

By the bankruptcy of the Plaintiff the suit becomes defective; if not abated by analogy to law. The Assignees ordered to be made parties in a limited time, or the bill to be dismissed; whether with costs, *Quære*.

Practice of the Court of Exchequer, holding the bankruptcy of the Plaintiff no abatement and therefore dismissing the bill with costs for want of prosecution, [p. 426.]

Upon the bankruptcy of the Plaintiff in an Injunction Bill the Assignees to be made parties, or the Injunction dissolved, [p. 427.]

Whether Assignees under a Commission of Bankruptcy against the Plaintiff are made parties by Bill of Revivor or Supplemental Bill in nature of it, &c. *Quære*. [p. 428.]

THE usual Motion was made to dismiss the Bill, which was for an account for want of prosecution. The Plaintiff had become bankrupt.

Mr. *Agar*, in support of the Motion.—There is no distinction between abatement by the bankruptcy of the Plaintiff and that of the Defendant, as in *Monteith v. Taylor* (2). The objection to this Motion is, that the Plaintiff is become bankrupt; who insists, that therefore his Bill cannot be dismissed. In *Ex parte Berry* (3) the Plaintiff had become bankrupt; and, the usual Order being obtained to dismiss the Bill with costs for want of prosecution, the bankrupt's Petition to be relieved from the costs was dismissed. The reason, given by Lord Thurlow in *Sellers v. Dawson* (4), upon refusing to discharge the Order to dismiss the Bill is, that, being obtained after abatement by the Plaintiff's bankruptcy, it was a nullity. In *Davison v. Butler* (5) also the Plaintiff was the bankrupt; and Baron Thompson stated the constant practice to be, that the assignees of a bankrupt, in order to take advantage of a suit commenced by him, filed a Supplement Bill, and not a Bill of Revivor: but, if the suit abated, it would be necessary to revive; and that, if they think the suit beneficial, they may take it out of his hands: if they decline that, there is no reason, why the Defendant should not have his costs. In *French v. *Barton* (6) the Order was, [* 425] that the assignees should file a Supplemental Bill, or the Bill should be dismissed.

Mr. *Heald*, for the Plaintiff.—The bankruptcy being an abate-

(1) 1 Rose's Bank. Cases, 196.

(2) *Ante*, vol. ix. 615.

(3) 1 Dick. 81.

(4) 2 Dick. 738; 2 Anst. 458, n.

(5) 2 Anstr. 460, n. 1 Co. Bankrupt Law, 8th edit. by Mr. Roots, 546.

(6) *French v. Barton*, 6th June, 1781. Mr. *Ainge*, for the two Defendants, alleging, that the Plaintiff, having replied to the Answers, became bankrupt, and that the assignees had not stirred in the cause, moved, that the Bill may stand dismissed with costs for want of prosecution.

Upon hearing Mr. *Milford*, for the Plaintiff, the Order was, that the assignees do file a Supplemental Bill on or before the first day of next Term; or in default thereof, that the Plaintiff's Bill do stand dismissed as against the Defendants, the Bartons, without Costs.

ment, according to *Sellers v. Dawson*, this motion cannot be made. In *Hall v. Chapman* (1) Sir Thomas Clarke thought the Order to dismiss irregular. In *Monteith v. Taylor* the bankrupt, being the Defendant, had not, as this bankrupt has, to support the Bill. The distinctions, stated by Lord Redesdale (2) between suits [* 426] become abated, and those merely * defective, and between Bills of Revivor and in the nature of Bills of Revivor, and the reasons of those distinctions, are very nice. If, however, it can be doubted, whether the bankruptcy of the Plaintiff is an abatement, there is at least a defect. If, according to *French v. Barton*, the assignees are to be compelled to file a Supplemental Bill within a given time by an Order, that otherwise the Bill shall be dismissed, it must be without costs; as the Order was in that instance.

Mr. Agar, in reply, said, that, as the bankrupt Defendant would obtain costs, so the bankrupt Plaintiff must pay them.

The Lord CHANCELLOR [ELDON].—So many motions have occurred before me with reference to the bankruptcy both of Plaintiffs and Defendants, that I did not expect, the general proposition I laid down would have been applied to a case, to which I have continually endeavored to prove it has no application. It is clear, that bankruptcy is no abatement at law: but Courts of Law have modes of so regulating the matter, that finally no great injustice is felt. The Court of Exchequer adopts a different rule of practice from that, which prevails here; and each Court must be governed by its own settled practice. Not meaning therefore to consider, which is the wiser rule, I am not to be understood as bearing upon the decision of the Court of Exchequer in the observations I shall make. Baron Thompson certainly has great knowledge of the practice of this Court: but this difficulty occurs upon the rule of the Court of Exchequer. Though they held the bankruptcy not an abatement in equity by analogy to law, they would not even let him speed the cause. If the bankruptcy was not an abatement, what [* 427] right had they to dismiss the Bill? * Why not let the Plaintiff speed his cause, and go on? I do not know their practice upon injunction bills; here on the bankruptcy of the Plaintiff the practice is not to dissolve the injunction: but the motion is, that the assignees shall come in, or the injunction be dissolved (3); which shows, that this Court takes notice of the

(1) 1 Dick. 348.

(2) Treat. on Plead. 54, &c. In page 62, bankruptcy is put as an instance of a sole Plaintiff, suing in his own right, deprived of his whole interest in the matters in question by an event subsequent to the institution of the suit; requiring, therefore, an original Bill in the nature of a Supplemental Bill. In the next page, bankruptcy is put as an instance of the interest of a Defendant, not determined, but only becoming vested in another; a defect capable of being supplied by Supplemental Bill. In page 67, treating of an original Bill in nature of a Supplemental Bill, as necessary, when the interest of a Plaintiff or Defendant wholly determines, and the suit therefore cannot be continued by Bill of Revivor, nor its defects be supplied by supplemental Bill, the case of bankruptcy is not noticed.

(3) This is said in the Register's Office to be a Motion of course, "unless the Plaintiff shall, within a fortnight after notice to his Clerk in Court, bring the assignees before the Court."

Bankruptcy. There must have been some particular circumstances in that case. The Order could not have been made upon that mere analogy.

In this Court there are several decisions, not very easily to be reconciled. In *Sellers v. Dawson* Lord Thurlow seems to have got this length; that the Order to dismiss was a nullity, and therefore not to be discharged; that the bankruptcy, if not an abatement, was in the nature of an abatement; and he undoubtedly held, that the Court has never permitted itself to be embarrassed by the difficulty of giving notice to the assignees. Suppose the case of the Plaintiff in a bill for an injunction becoming bankrupt, that the assignees will not adopt his suit, and the difficulty of giving them notice. There are many suits, that a bankrupt may maintain; and, if he shows a clear case for an injunction, it is difficult to justify an Order, that, if the assignees are not brought before the Court in a reasonable time, the injunction shall be dissolved, perhaps before the certificate, and in the plainest case for upholding the injunction between those parties.

This Court, however, without saying, whether bankruptcy is or is not strictly an abatement, has said, that according to the course of the Court the suit is become as defective, as if it was abated; and, as the assignees will have the benefit of the suit, and assuming in practice, that he, who is a bankrupt, will continue so, the course, which the Court has taken, is to require him to bring his assignees before it by bill of revivor or supplemental bill [*428] in the nature of a bill of revivor, or by whatever name it is called; and the Court supposing, that the bankrupt will find the means of giving the assignees notice, and not troubling itself with that difficulty, dissolves the injunction, frequently with great injustice, if they do not come here.

The proper order in this case therefore is, that the assignees shall be brought before the Court within a reasonable time, viz. the 1st of February: otherwise the bill to be dismissed; but not with costs, unless that can be justified upon an inquiry into those cases, where an injunction has been dissolved, if the assignees of the Plaintiff would not come in. If the Court in that instance does not, acting by the analogies of law, compel him, though a bankrupt, to proceed with the suit, if the assignees will not take it up, dissolving the injunction, without considering, whether it is reasonable or not, it would be hard upon him to dismiss his bill and make him pay the costs, though he may have a right to go on (1).

The case of the bankrupt Defendant has no analogy. In that instance the Plaintiff has only to make the assignees parties.

1. This case is likewise reported in 1 Rose, 196.

2. See the note to *Williams v. Kinder*, 4 V. 387.

(1) In *Wheeler v. Malins*, 4 Madd. 171, and *Porter v. Coz*, 5 Madd. 80, the Bill was ordered to be dismissed, if the assignees would not file a supplemental Bill within a fortnight. See *Williams v. Kinder*, ante, vol. iv. 387, and the note, and Mr. Beames's Elem. Pl. Eq. 286.

BRANDON v. ROBINSON.

[1811, Dec. 18.]

PROPERTY may be limited to a man, to go over on a certain event, as bankruptcy; but, while his property, it must be subject to the incidents of property, and therefore to debts (a).

Trust to pay the dividends from time to time into the proper hands of a man, or on his proper order or receipt, subscribed with his own hand, that they should not be grantable, transferable, or otherwise assignable by way of anticipation of any unreceived payment, or any part thereof: on his decease the principal to be paid to such persons as in a course of administration would become entitled to his personal estate, and as if it had been his personal estate, and he had died intestate. An interest for life in the dividends, assignable under a Commission of Bankruptcy: with a limitation over of the principal to those entitled under the Statute of Distributions.

Right of a married woman to dispose of property settled in trust for her separate use, to be paid into her hands, on her receipt, &c.; unless restrained to payment not by anticipation (b), [p. 434.]

THE Bill stated, that Stephen Goom by his Will, dated the 1st of August, 1808, devised and bequeathed to the Defendants Robinson and Davies all his real and personal estates upon trust to sell; and to divide or otherwise apply the produce to the use of all and every his child or children, living at his decease, in equal proportions; deducting from the share of Thomas Goom the sum of 500*l.*, which had been advanced to him; and from the share of William Goom what should be due from him to the testator at his decease: the said sums so to be deducted, to be divided equally among the other children; and he declared his Will, that the said several legacies, shares, and eventual interests, of such of the legatees as at the time of his decease should have attained the age of twenty-one should be considered as vested interests; and, if there should be but one survivor, upon trust to pay and transfer the same unto such only survivor, his or her executors, &c. for his or her own use, subject nevertheless to such directions as after mentioned in respect to the shares or interests of such of the said legatees as were females, and also in respect to the share and interest of the said Thomas Goom; and he directed, that the eventual share and interest of his said son Thomas Goom, of and in his estate and effects, or the produce thereof, should be laid out in the public funds or in government securities at interest by and in the names of his said trustees, &c. during his life; and that the dividends, interest, and produce, thereof, as the same became due and payable,

(a) 2 Story, Eq. Jur. § 974; *Hallett v. Thompson*, 5 Paige, 583.

(b) There is no doubt that a gift of personal estate, or of the rents and profits of real estate, to a married woman, for her separate use, during her life, would give her complete power to dispose of the same. 2 Story, Eq. Jur. § 1392, note, and cases cited; 2 Roper, Husband and Wife, ch. 19, § 2, p. 182; *Osgood v. Breed*, 12 Mass. 525; *Hood v. Archer*, 1 McCord, 225, 477; *Cassell v. Vernon*, 5 Mason, 332; *Bradish v. Gibbs*, 3 Johns. 523; *Anderson v. Miller*, 6 J. J. Marsh. 573; *Hejzer v. Bergen*, 1 Hoff. 1.

should be paid by them from time to time into his own proper hands, or on his proper order and receipt, subscribed with his own proper hand, to the intent the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or of any part thereof; and that upon his decease the principal of such share, together with the dividends and interest and produce thereof, should be paid and applied by his trustees or executors, their heirs, executors, &c. unto and amongst such person or persons, as in a course of administration would become entitled to any personal estate of his said son Thomas Groom, and as if the same had been personal estate belonging to him, and he had died intestate.

The Bill farther stated, that after the death of the testator his son Thomas Groom, having attained the age of twenty-one, became a bankrupt. The Plaintiff was the surviving assignee under the Commission; and the Bill prayed an execution of the trusts of the Will and an account, that the estates may be sold, and the clear residue ascertained; and that the Plaintiff may receive the benefit of such part or share thereof, or of the interest therein, as he shall be entitled to as assignee under the Commission.

To this Bill the Defendants, the trustees, put in a general demurrer.

Mr. *Hart* and Mr. *Horne*, in support of the demurrer.

—The Plaintiffs claim the right, as standing in the place [* 431] of the bankrupt, to an immediate account, and to receive all his share in this property; and the questions are, 1st, whether the testator, giving his property to trustees in the confidence, that they should under certain restrictions pay this proportion of it to his son, had a right to impose such restrictions as would protect the property against the assignees under a Commission of Bankruptcy against him; 2dly, Whether, if the testator had that right, he has sufficiently exerted it by this Will.

The proposition, that a testator may limit a personal benefit strictly, excluding any assignee either by actual assignment or by operation of Law, cannot now be disputed. He might limit the enjoyment to continue up to a particular period or event, at that period or on that event to be forfeited, or transferred to some other person. The validity of such a restriction was first decided in the case of *Dommett v. Bedford* (1), establishing, that an alienation in this way is a forfeiture as much as actual alienation. That case was followed by the decision in *Shee v. Hale* (2), that a condition not to sell, assign, charge or dispose of, or empower any person to receive, was broken by taking the benefit of an Insolvent Act. The reasons of the Master of the Rolls for that judgment, though representing the case as stronger than that of the bankrupt, have a close applica-

(1) *Ante*, vol. iii. 149; 6 Term Rep. 684; see the note, *ante*, vol. iii. 150.

(2) *Ante*, vol. xiii. 404.

tion: viz. the testator's intention to make the annuity personal to his son; and that he was not to have it as a fund of credit.

If the testator has a right so to limit, he may direct the trustees, who are to take the absolute legal interest, to dispose of it from time to time in a particular manner, to pay into the hands of [* 432] the *legatee personally from time to time, and to no other.

Such a disposition is not opposed by any principle of Law or public policy. The son acquires nothing, until each payment becomes due. When he actually receives, and then only, the trust is executed; and the effect of a decision, that the payment is to be made, not to him personally, but to others, who by representation are become at Law entitled to his rights, will be making another Will for the testator. The trustees can only be called upon to execute the trust in the terms in which the testator has declared it; viz. to pay into his hands, from time to time, upon his receipt alone. He has no right of property whatever, except in what has so got into his hands: but this Plaintiff, not content with an annuity for life, which is all the bankrupt was intended to enjoy, seeks an immediate and absolute payment of the fund itself; which is disposed of upon his death as completely and absolutely, as if it had been expressly given to his widow and children, or, if he should leave none, to his next of kin

The Lord CHANCELLOR.—There is an obvious distinction between a disposition to a man, until he becomes bankrupt, and then over, and an attempt to give him property, and to prevent his creditors from obtaining any interest in it, though it is his. Can it be contended, that, if the bankrupt during his whole life never signed a receipt, the interest during his life would be undisposed of, and would fall into the residue?

Mr. *Leach* and Mr. *Roupell*, for the Plaintiff, gave up the claim to the principal. If the Plaintiff has any interest, this [* 433] Demurrer *cannot be supported; and upon that the question put by the Court, is decisive. Can it be contended, that the money received as his share before his certificate is not the property of his creditors? That alone disposes of the demurrer. Certainly a gift may be conditional until a particular event; as until the party becomes bankrupt: but this testator has not so limited the terms of his disposition: those cases have therefore no application. This is a general bequest for the life of the son, with a declaration, that he shall not have the power of assignment; and the question is, whether that restraint prevents assignment by the operation of the Bankrupt Laws. How can this be distinguished from the case of a lease with a proviso not to assign without license; which lease though the lessee could not assign would pass by the assignment under a Commission of Bankruptcy against him; *Goring v. Warner* (1): as it might be sold by the Sheriff under an execution. The voluntary act is restrained; but not the act of Law

in invitum. There is but one exception to the general effect of the assignment in bankruptcy. That is the case of half-pay ; which is excepted, as being a purchase by the public of the public duty of an officer.

The Lord CHANCELLOR [ELDON].—There is no doubt, that property may be given to a man, until he shall become bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life estate ; and, as I have observed, a disposition to a man, until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. * If that condition is so [* 434] expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited.

In the case of *Foley v. Burnell* (1) this question afforded much argument. A great variety of clauses and means was adopted by Lord Foley with the view of depriving the creditors of his sons of any resort to their property : but it was argued here, and, as I thought admitted, that, if the property was given to the sons, it must remain subject to the incidents of property, and it could not be preserved from the creditors, unless given to some one else.

So the old way of expressing a trust for a married woman was, that the trustees should pay into her proper hands, and upon her own receipt only : yet this Court always said, she might dispose of that interest (2), and her assignee would take it ; as, if there was a contract, entitling the assignee, this Court would compel her to give her own receipt, if that was necessary to enable him to receive it. It was not before *Miss Watson's Case* that these words, “ not to be paid by anticipation,” &c. were introduced. I believe these were Lord Thurlow's own words, with whom I had much conversation upon it. He did not attempt to take away any power the Law gave her, as incident to property, which, being a creature of Equity, she could not have at law : but, as under the words of the settlement it would have been her's absolutely, so that she could alien, Lord Thurlow endeavored to prevent that by imposing upon the trustees the necessity of paying to her from time to time, and not by anticipation ; * reasoning thus ; that Equity, making her the [* 435] owner of it, and enabling her, as a married woman, to alien, might limit her power over it : but the case of a disposition to a man, who, if he has the property, has the power of aliening, is quite different.

This is a singular trust. If upon these words it can be established, that he had no interest, until he tenders himself personally to the trustees to give a receipt ; then it was not his property until then : but if personal receipt is in the construction of this Court a neces-

(1) 1 Bro. C. C. 274.

(2) *Pybus v. Smith*, *ante*, vol. i. 189 ; 3 Bro. C. C. 340. See the notes, *ante*, vol. i. 194 ; v. 17

sary act, it is very difficult to maintain; that if the bankrupt would not give a receipt during his life, and an arrear of interest accrued during his whole life, it would not be assets for his debts. It clearly would be so.

Next, is there in this Will enough to show, that, as this interest is not assignable by way of anticipation of any unreceived payment, therefore it cannot be assigned and transferred under the Commission of Bankruptcy? To prevent that it must be given to some one else; and unless it can be established, that this by implication amounts to a limitation, giving this interest to the residuary legatee, it is an equitable interest, capable of being parted with. The principal, at the death of the bankrupt, will be under quite different circumstances. The testator had a right to limit his interest to his life; giving the principal to such person as may be his next of kin at his death, to take it as the personal estate, not of the son, but of him the testator: as if it was the son's personal estate, but as the gift of the testator.

The Demurrer must, upon the whole, be over-ruled.

1. This case is likewise reported in 1 Rose, 197.

2. See, *ante*, the note to *Shee v. Hale*, 13 V. 404, as to the limitations by which an interest may go over, whenever the first taker divests himself, or even is deprived by operation of law, of the power of personal enjoyment thereof.

3. With respect to the restrictions of a married woman's power of disposition over property settled to her separate use, see note 4 to *Pybus v. Smith*, 1 V. 189.

[* 436]

HOLDEN, *Ex parte*.

[1811, Dec.]

ORDER for payment out of a Bankrupt's estate, with interest to the time of payment, in preference to all other creditors, with costs, under Stat. 51 Geo. III. c. 15, s. 48, for an issue of Exchequer bills to relieve commercial credit.

A PETITION was presented by the Secretary to the Commissioners, for an issue of Exchequer Bills for the relief of commercial credit under the late Act of Parliament (1), declaring, that every obligation or other security, entered into by any person or persons, either as principal or surety, who shall become bankrupt, shall from the time of such bankruptcy be forfeited; and that all the estate of the bankrupt shall be liable to and chargeable with the payment of the principal and interest due upon such obligation or other security, and all the costs attending the recovery of the same; and that the claims of the said Commissioners shall be first paid and satisfied out of the estate and effects of such bankrupt or bankrupts, and in preference to the claim of any other creditor or creditors; and it

(1) Stat. 51 Geo. III. c. 15, s. 48.

shall be lawful to the said Commissioners in the name of their secretary to apply by petition to the proper Courts of England, having jurisdiction of the matters of such Commission of Bankruptcy, to make due Order accordingly; which such Courts respectively are hereby authorized and required to make.

The Order declared the estate of the bankrupt chargeable with the principal sum of 25,000*l.*, and interest up to the time of payment of the principal; and directed, that the said sum, with interest up to the payment, be paid out of the estate of the bankrupt, in preference to the claim of any other creditor, to the cashier of the Bank of England, according to the directions of the Act; *and the costs of the application, and all the costs [*437] attending the recovery of the said 25,000*l.*, and interest, to be paid by the assignees out of the bankrupt's estate to the petitioners.

THIS case is likewise reported in 1 Rose, 173.

MORRIS v. COLMAN

[1812, JAN. 14.]

JURISDICTION in the case of a Theatre considered as a partnership (a).

Contract with the proprietors of a Theatre not to write dramatic pieces for any other, legal; as a similar restraint of a performer would be; not resembling a covenant restraining trade generally (b).

Covenant, restraining trade within particular limits, or partners from carrying on the same trade for their private benefit, legal (c), [p. 438.]

Theatrical performers act only under a license; and are treated as vagrants, if not licensed, [p. 438.]

VARIOUS disputes having arisen among the proprietors of the Theatre in the Haymarket, a Bill was filed; praying an execution of the Articles of Agreement, an Injunction to restrain Mr. Colman

(a) See *ante*, note (b) *Waters v. Taylor*, 15 V. 10.

(b) The present case is commented on in *Clarke v. Price*, 2 J. Wilson, C. C. 157; and in *Kemble v. Kean*, 6 Simons, 333; see also, *Story*, Partnership, § 225, note. But a Court of Equity will not decree a specific performance of a contract by an actor, that he would act twenty-four nights at a particular theatre during a certain period of time, and that he would not in the mean time act at any other theatre in the same town; *Kemble v. Kean*, 6 Simons, 333. And as it would not decree a specific performance in that case, the Vice Chancellor thought it ought not to restrain the defendant from acting at another theatre, that is, from breaking the negative part of his covenant. In his judgment the Vice Chancellor commented at large upon the cases of *Morris v. Colman*, and *Clark v. Price*, from which he labored to distinguish the case before him. His reasoning, according to Mr. Justice Story, has not relieved the subject from all doubt. 2 *Story*, Eq. Jur. § 958, note; see also, *Kimberly v. Jennings*, 6 Simons, 340.

(c) As to contracts in restraint of trade, see *ante*, note (b) *Shackle v. Baker*, 14 V. 468.

from acting as manager, and a reference to the Master for the appointment of a manager.

(1) An Injunction was granted : and a reference directed to the Master to inquire, whether the Defendant Mr. Colman had performed the duties of manager, and what he was doing and could do in the discharge of those duties. Upon a motion to dissolve the Injunction a question arose upon the validity of a clause in the articles, restraining Mr. Colman from writing dramatic pieces for any other Theatre, or; as the construction was represented for the Plaintiff, giving the Haymarket Theatre a right of pre-emption.

Mr. *Hart* and Mr. *Shadwell*, for the Defendant Colman, in support of the motion, compared this provision to covenants [* 439] in restraint of trade : which are void on principles of public policy.

Sir *Samuel Romilly* and Mr. *Bell*, for the Plaintiff, contended, that this provision was no more against public policy than a stipulation, that Mr. Garrick should not perform at any other Theatre than that, at which he was engaged, would have been.

The Lord CHANCELLOR [ELDON].—I cannot perceive any violation of public policy in this provision. The case of trade, to which it has been compared, is perfectly distinct. It is well settled upon that principle, that notwithstanding such a covenant, restraining trade in general, a man shall be at liberty to engage in commerce : but that has been broken in upon to the extent of giving effect to covenants restraining trade within particular limits ; and in partnership engagements a covenant, that the partners shall not carry on for their private benefit that particular commercial concern, in which they are jointly engaged, is not only permitted, but is the constant course (2).

If that is so with regard to trade, it is impossible to maintain, that theatrical performers, who act only under a license, and are treated as vagrants, if not licensed, may not enter into such engagements. The contract is not unreasonable upon either construction ; whether it is, that Mr. Colman shall not write for any other Theatre without the license of the proprietors of the Haymarket Theatre ; or whether it gives to those proprietors merely a right of pre-emption. If Mr. Garrick was now living, would it be unreasonable, that he should contract with Mr. Colman to perform only at the Haymarket Theatre, and Mr. Colman with him to write for that Theatre [* 439] alone ? * Why should they not thus engage for the talents of each other ? The ground might be supposed, that nothing could be made of the Theatre without exhibiting the talents of such a man ; and in this instance that he may get more to himself and the other proprietors by this contract than he could by hard bargains at other Theatres.

(1) As to the jurisdiction upon this subject, considered as a partnership, see *ante*, *Waters v. Taylor*, vol. xv. 10 ; *Ex parte Ford*, vii. 617 ; *Ex parte O'Reilly*, i. 112, and the note, 130.

(2) *Shackle v. Baker*, *ante*, vol. xiv. 468, and the references.

I cannot therefore see any thing unreasonable in this: on the contrary, it is a contract, which all parties may consider as affording the most eligible, if not the only, means of making this Theatre profitable to them all, as proprietors, authors, or in any other character, which they are by the contract to hold.

1. *ALTHOUGH* the regulation of the details of a theatre is not a very manageable jurisdiction, yet courts of equity, when it is pressed upon them, are bound by precedent not to renounce it; and will deal with such questions exactly as if they were cases of ordinary partnerships: see, *ante*, note 2 to *Ex parte O'Reilly*, 1 V. 112.

2. As to the illegality of covenants which would operate in *general* restraint of trade, see the note to *Shackle v. Baker*, 14 V. 468; but it is a common covenant in partnership articles, that no partner shall embark in another concern of the same kind with that in which the partnership are engaged: *Glassington v. Thwaites*, 1 Sim. & Stu. 132.

WILSON, *Ex parte*.

[1811, Nov 13; DEC. 11.]

A PETITION in Bankruptcy, praying distinct Orders under several Commissions, requires several stamps.

Separate Execution under joint Judgment, [p. 441.]

Right of joint creditors under a separate Commission of Bankruptcy to an account and application of joint effects: limited as to the separate estate to the surplus not voting in the choice of assignees, [p. 441.]

THE petitioners in Hilary Term obtained a verdict as joint creditors of Graves, Wheatly, and Patton. A separate Commission of Bankruptcy had previously issued against Graves: in May a separate Commission issued against Wheatly; and another in July against Patton; and they were all declared bankrupts.

The petition prayed liberty to prove under the separate Commissions, or any of them, and to vote in the choice of assignees under the Commission against Patton; that distinct accounts may be kept of the joint and separate estates, &c.; and that the petitioners may be at liberty to assent to, or dissent from, the certificates.

The petition came on for an explanation of the minute, which was taken in August last shortly, as for "the common order." * Wheatly had obtained his certificate; and the [*440] others were before the Lord Chancellor for allowance.

The Lord CHANCELLOR suggested a doubt, with reference to the stamp laws, whether the Order prayed could be made.

Mr. *Richards*, in support of the Petition.—These petitioners, who are found by verdict to be joint creditors of these three persons, as partners, must come with one petition, applying to them all. Three petitions would have been open to objection, as not embracing their joint, as well as separate, estates. The assignees under Graves's Commission have joint effects, to the benefit of which the

petitioners are entitled, but cannot reach them without a petition, comprehending the three; who are thus united on the same subject; and must therefore be considered and treated jointly.

Sir *Samuel Romilly*, for the Assignees under the Commission against Patton.—These creditors are entitled to have the account taken under Graves's Commission alone; and though generally joint creditors are entitled to prove under each separate Commission for the purpose of assenting to, or dissenting from, the certificate, and receiving a dividend from the surplus beyond the separate debts, no such Order can be made under one petition in three bankruptcies, perfectly unconnected. The object, sought under each Commission, is quite distinct: under Patton's merely the common Order as to the certificate, &c.; under Graves's and Wheatly's, the

Order for distinct accounts and for a dividend. It is true, [* 441] that one Order has sometimes been *made in several matters; but that is only where they are so connected, that a distinction is impracticable: an Order, for instance, in two causes to have a sum of money transferred from the one to the other; and so in bankruptcy, where it is impossible to have distinct Orders, the rule gives way to necessity: but this is an attempt to procure one Order, on one petition, in distinct matters; and against that the last Stamp Act (1), is decisive; imposing the duty upon the petition "in any matter of bankruptcy," not in several matters. The only matter therefore, in which this can be noticed, is that of Graves. In the others, from the want of a stamp, it is not legally present; and the duty is satisfied by the Order in Graves's bankruptcy. Could it be contended, that if two or three indorsers of a bill became bankrupt, the holder, as he had one debt, might apply by one petition to prove under all the separate Commissions? Your Lordship can neither pronounce separate Orders under one petition, nor one Order in these several Commissions, in no way connected, not depending on each other, and having nothing in common. The Order, sought under Graves's Commission, to have distinct accounts, would be for the benefit of all the joint creditors: that under Patton's, for liberty to assent to, or dissent from, the certificate, would be confined to the individuals applying; and, as far as that is the object, operating to deprive a man of his liberty and the power of acquiring property, the greatest strictness is required.

The Lord CHANCELLOR [ELDON].—These petitioners, having a joint judgment, though a Commission issued before any [* 442] separate execution, still *continued joint creditors; and as such are entitled to an account and application of the joint effects, but only under one of these Commissions; and under all the three Commissions any surplus would go to the joint creditors, but according to the practice under the common Order, not to vote in the choice of assignees. Laying aside for the present the objection upon the Stamp Act, upon a petition under Patton's Com-

mission, I must have ordered the proof for the surplus in that way : but it does not follow, that I should give you leave to assent to, or dissent from, the certificate ; which has been lying before me for allowance ; and am I to send it back without knowing, whether your proof would make a difference ? The petitioners, while they have been insisting, that the effect of the joint judgment, without a separate execution, made them separate, and not joint, creditors, have lost their opportunity, when one of the bankrupts has during that contention obtained his certificate, and the others are lying before me. The petitioners aimed at being considered separate creditors to the extent of voting in the choice of assignees ; and when they cannot succeed upon the principle of the petition to affect the creditors, seek, as far as relates to the bankrupt, to have the certificate sent back.

Dec. 11th. The Lord CHANCELLOR said, the Stamp Office were decidedly of opinion, that this petition required three stamps.

By the 62d section of the statute of 6 Geo. IV., c. 16, joint creditors are empowered to prove under a separate commission, for the purposes of voting in the choice of assignees, and of assenting to, or dissenting from, the certificate.

WALKER v. WINGFIELD.

[* 443]

[1812, JAN. 17.]

As to admitting in evidence a Parish Register, not kept according to the Canon, requiring weekly entries, or a copy without proof, that the original is not to be found, *Quære* (a).

Parish Register admissible evidence notwithstanding the loss of a leaf, not destroying the series of entries.

Declarations of relations evidence of pedigree, but inconclusive without showing on what occasion, what led to them, &c. Whether a physician or servant, who attended the family, can be admitted as one of the family, *Quære* (b).

Object of taking evidence in secret to prevent attempts to support defective evidence already given : but farther inquiry, when necessary, not refused.

UPON a question of pedigree, arising out of a claim as next of kin of an intestate, the Lord Chancellor made the following observations on the evidence before the Master.

(a) It is deemed essential to the official character of these books, that the entries in them be made promptly, or at least without such long delay as to impair their credibility, and that they be made by the person, whose duty it was to make them, and in the mode required by law, if any has been prescribed. 1 Greenl. Ev. § 485 ; *Doe v. Bray*, 8 B. & C. 813.

As to Parish Registers, see *ante*, notes (a) and (b) *Auriol v. Smith*, 18 V. 198.

(b) The rule of admission is restricted to the declarations of deceased persons, who were related by blood or marriage to the person, and, therefore, interested in the succession in question. 1 Greenl. Ev. § 103 ; *Johnson v. Lawson*, 2 Bing. 86 ; *Markton v. Attorney General*, 2 Russ. & M. 147, 156 ; *Crease v. Barrett*, 1 Cramp.

The Lord CHANCELLOR [ELDON].—With regard to the general proceedings of this Court, great care is used by having all the evidence taken in secret not to permit an examination, that goes to supporting defective evidence already given. All our rules as to publication go to that. The Court however, where it observes, that farther inquiry is necessary, never refuses it, either by a reference back to the Master, or before a jury; where in these cases of pedigree it would perhaps have been as well if the Court had said the inquiry should originate.

Attending, as I must, to the nature of the evidence before the Master, the question as to the manner in which Registry Books ought to be kept, and whether that is to rest upon the law, as it is understood to stand at present, is a question certainly of great public importance. The Canon (1) provides the mode, in which the [* 444] registers are to be kept; and, attending to the sort of registers, that are received, it is difficult to say, why the Fleet Registers are rejected. It is difficult to say, upon what principle a copy is received, except that the register cannot conveniently be spared from the place, where it is supposed to be deposited; and should the principle be applied to registers with the same strictness as to other documents, there is not one in one hundred kept according to the Canons. Lord Rosslyn [Loughborough] once proposed to move the House of Lords to reject all registers: but on account of the inconvenience I prevailed with his Lordship to relinquish that intention; and we are now in the habit of administering registers, and copies of registers, though not kept according to the Canon, that is, according to law. Whether this is to continue, is a question of very great importance.

Another material circumstance is the extreme danger attending the rule, which is constantly acted on, that a copy of the register [* 445] shall be received without more than * merely proving it to be a copy of the register. I know, that instances have occurred of an estate recovered by producing the copy of a register, when no credit was due to the original; and am satisfied, that the security of title is more preserved by requiring the production of the

Mees. & R. 919, 928; *Jewell v. Jewell*, 1 Howard, S. C. 231; S. C. 17 Peters, 213; *Jackson v. Browne*, 18 Johns. 37; *Chapman v. Chapman*, 2 Conn. 347; *Waldron v. Tuttle*, 4 N. H. 371; Cowen & Hill's note, 466 to 1 Phil. Ev. 240.

(1) Canon, 70: directing a book to be kept in every parish for registering every christening, wedding, and burial, to be kept in a coffer with three keys: one to be with the minister, the others with the church-wardens, severally; and that upon every Sabbath day, immediately after morning or evening prayers, the minister and church-wardens shall take the said parchment out of the said coffer; and the minister in the presence of the church-wardens shall write and record in the said book the names of all persons christened, together with the names and surnames of their parents, and also the names of all persons married and buried in that parish, in the week before, and the day and year of every such christening, marriage, and burial; and, that done, they shall lay up that book in the coffer, as before; and the minister and church-wardens unto every page of that book, when it shall be filled with such inscriptions, shall subscribe their names.

original register, and not admitting a copy, than by any other rule guarding the inheritance.

The case now before me has this singular circumstance. The book produced I take to be down to the year 1662 nothing but a copy. I do not say, considering the laxity, into which we have fallen, that it may not be evidence; but at *Nisi Prius* I would not have permitted it to be read without proof, that the original was not to be found. This is not that book, kept according to the Canon, in which the entries ought to be made every week. This book must have been compiled, if not at a subsequent period, since that year 1662, by copying at once the transactions of four or five years. The Master therefore has not had before him that species of evidence, which must be produced, before the Court will part with this fund. Looking at this book, and taking it to be a copy down to a certain period, and a collection in subsequent periods, I do not doubt its integrity. A leaf is cut out, that would be most material, since 1654: but by taking away that leaf the series of entries about that time is not destroyed. That series still appears regular; and, being correct, it is too much to say, the loss of a leaf is to destroy the character of the book.

That evidence of relationship is very easily lost among families in the lower order of life is notorious. In cases of this sort we rest with great satisfaction on documentary evidence, having nothing suspicious in its * nature, and connected with very [* 446] early periods in the history of the descent of both the lines, which this case attempts to bring forward. The Wills produced are a recognition of relationship, not ascertaining the degree; that the daughters of Joseph Curtis by some wife were the kinswomen of William Walker; but, when by old documents you get evidence, that cannot mislead, to the fact, that relationship existed, you are led to show, what degree of relationship. On the one hand there is no attempt to show, what the relationship was: on the other there is an attempt, which can be made out only by documentary evidence, or evidence of reputation. Without entering into all the nicety, with which that has been recently discussed, I do not apprehend, that what Lord Kenyon and Mr. Justice Buller have said has been displaced by later decisions. The question, whether a physician, or a servant, who has attended the family, can be admitted, as one of the family, has not, I conceive, been decided. Making out the relationship *aliunde*, you may clearly give the declaration of a relation in evidence (1): but the miserable trash, contained in these declarations, cannot be estimated without putting many other questions; upon what occasion the declaration was made; what led to it, &c. Has it ever happened in ordinary conversation, that you heard a declaration made without something leading to it, as that natural effect of the knowledge of the relation making the declaration, that would in truth be a sort of parol pedigree?

(1) *Anle, Forde v. Young, Whitlocks v. Baker*, vol. xiii. 140, 511; see the note, 147.

The fact of relationship however being actually proved, but neither case showing, what it was, except by declarations of more or less weight, and some evidence, that the Master was not at liberty to receive, is it possible to say, this case is proved, so as to preclude farther inquiry, either by a reference back to the Master to [* 447] * review his opinion, or by an issue; and, according to the observations I have made upon evidence, the book must be produced.

An Issue was directed.

1. As to the admissibility of registers, or copies of registers, as evidence of births or marriages, see, *ante*, notes 1, 3, to *Lloyd v. Passingham*, 16 V. 59.

2. The most vigilant caution is used, to prevent attempts to bolster up defective evidence by farther examinations; but still the court, when it sees farther inquiry to be necessary, will provide for its reception in the manner best calculated to exclude fraudulent management: see notes 2, 3, to *Sandford v. Paul*, 1 V. 398; and note 1 to *Parkinson v. Ingram*, 3 V. 603.

3. With respect to the evidence admissible upon questions of pedigree, see note 3, to *Vowles v. Young*, 9 V. 172.

ANDERSON v. DARCY.

[1812, JAN. 21.]

SERVICE upon the Attorney, the Defendant being abroad, only to compel Appearance, not for the purpose of a special Injunction in the first instance.

Declaration of one of the Arbitrators, that, had he seen a letter, of which, being mislaid at the time, the contents were proved, he would have acted otherwise, not sufficient against an award on the ground of mistake admitted by the Arbitrators; of which there ought to be clear, distinct, evidence, and an Affidavit by the Arbitrators, to induce a Court of Equity to set aside the Award, or a Court of Law to refuse to make it a rule of Court (a).

ON a Motion for dissolving an Injunction, against proceeding upon an award, establishing a debt of 2700*l*. against the Plaintiff, as being jointly concerned in a cargo, objections were taken, first, that, the debtor being abroad, service upon the attorney could not be

(a) If there is a mistake of a material fact, apparent upon the face of the award; or, if the arbitrators are themselves satisfied of the mistake, and state it (although it is not apparent on the face); and if, in their own view, it is material to the award; then, although made out by extrinsic evidence, Courts of Equity will grant relief. 2 Story, Eq. Jur. § 1456; see *Kleine v. Catara*, 2 Gall. 71, where the principal authorities are collected.

See farther as to the effect of awards, both upon law and fact, *ante*, note (a) *Knox v. Symmonds*, 1 V. 369; note (a) *Price v. Williams*, 1 V. 365; *Jones v. Boston Mill Corporation*, 6 Pick. 148; *Schenck v. Cutlerell*, 1 Green. Ch. 297; *Emerson v. Udall*, 13 Vermont, 477; *Strodes v. Patton*, 1 Brock. 228; 1 Metcalf & Perkins, Digest, tit. Arb. and Award, § 3, div. (g.) pl. 419, *et seq.*

The award of arbitrators, under the Statute of Indiana, is not conclusive of the law or the facts in the case. *Hamilton v. Wort*, 3 Blackf. 71; see *Dickerson v. Hayes*, 4 ib. 45.

good service for this purpose : secondly, that, a letter being mislaid, while the arbitration was proceeding, evidence of the contents was given, but was disregarded by the arbitrators ; and after the award, the letter, being found, was produced to one of the arbitrators ; who said, if he had seen that letter, he would have acted otherwise.

Sir *Samuel Romilly* and Mr. *Wilson*, in support of the Motion.—The course both of this Court and the Court of Exchequer, is uniform ; that, where an action has been brought by a person abroad, service upon the attorney shall be good service ; and, if an appearance is not entered in time, the common Injunction goes : but the Plaintiff * cannot thus at once obtain a special In- [* 448] junction : the only object of substituting service upon the attorney at law being to point out, where the process is to begin. *Stephen v. Cini* (1) and *Fullarton v. Lady Wallace* show the caution, with which the Court guards against this species of surprise. As to the merits, the whole of the Plaintiff's case is, that he had mislaid a letter, and the arbitrators disregarded the evidence of his clerk to its contents. Even the subsequent discovery of evidence is not a ground for setting aside an award ; as it would not be for reversing a judgment.

Mr. *Hart* and Mr. *Garratt*, for the Plaintiff, contended, that mistake, admitted by the arbitrator, was a clear ground for setting aside the award (2).

The Lord CHANCELLOR [ELDON].—Upon the point of practice, if the rule has been settled by decision, in which ever way appears of so little consequence, that I should not think of disturbing it. If it is now to be settled, as a new point, my opinion is, that the Plaintiff ought to have no more assistance against a party, who is abroad, than just enough to bring him in, or to put him in default for not coming in ; and when the Court goes the length of saying, that service upon the attorney shall be good service until default of appearance, the Plaintiff requires no farther assistance. I say, it is of little consequence which way the rule is settled, as it can hardly happen, that a Defendant, who is abroad, can come within the jurisdiction in time to save the ordinary application for an Injunction. All, therefore, that ought to * be done in the first [* 449] instance, is to order, that service upon the attorney shall be good service upon the party (3). *Stephen v. Cini* and the case there referred to seem to me according to the rational course.

The substantial ground of objection is, that at the time this was before the arbitrators, the letter being mislaid, evidence was offered of the contents of the postscript ; which was material from the expression " my coffee." The arbitrators received that evidence. It is said, they disregarded it : that is the expression. It is farther stated,

(1) *Ante*, vol. iv. 359, and the note, 360.

(2) *Ante*. *Morgan v. Mather*, vol. ii. 15 ; see the note, 22 ; *Knox v. Symmonds*, i. 369, and the note, 370.

(3) *Post*, *White v. Kievers*, *James v. Downes*, 471, 522 ; *Lane v. Williams*, *ante*, vol. vi. 798.

that after the award the letter was found; and one of the parties went to one of the arbitrators; who said, that, if he had seen that letter, he would have acted otherwise. It is not stated, that any representation was made to the other arbitrators.

Both in law and equity, if the arbitrators refused to hear evidence of the contents of a letter, proved to be lost, that would be a good objection to an application to carry the award into execution: but what is intended by saying, they disregarded it? They received the evidence.

The rule, as to mistake, is, that where there is clear and distinct evidence of mistake, the nature of it, and that it was made out to the satisfaction of the arbitrators, as to which Lord Thurlow insisted on having their affidavit, Courts both of Law and Equity will interpose; the one by setting aside the award, the other by refusing to make it a rule of Court: but this expression, used by a single arbitrator, does not fall within the reach of that rule, that the Court will disturb an award upon mistake admitted.

This Injunction must therefore be dissolved.

1. UPON an injunction bill to stay proceedings at law, where the defendant in equity is abroad, the affidavit of merits, necessary to support a motion that service of the *subpœna* upon such defendant's attorney shall be good service, ought to be made by the plaintiff in equity himself, and not by his solicitor, unless the latter has personal knowledge of the merits of the cause: *Kenuorthy v. Accunor*, 3 Mad. 551; and see the note to *Jones v. —*, 8 V. 46: but it is not required that the affidavit should state a previous application to the defendant's attorney to accept service, and his refusal: *French v. Roe*, 13 Ves. 593. No injunction, however, will issue against a defendant who is abroad, until appearance, or default of appearance: *White v. Klevers*, 18 Ves. 471.

2. As to the reluctance with which all courts, whether of law or equity, interfere with the award pronounced by arbitrators; and the cases in which such interference will be exercised to prevent plain injustice: see the note to *Price v. Williams*, 1 V. 365; and notes 3, 4, 5, 6, to *Knox v. Symmonds*, 1 V. 87.

[* 450]

BUCK v. LODGE.

The MASTER of the ROLLS for the LORD CHANCELLOR.

[1812, JAN. 20.]

ORDER on a purchaser, before conveyance, to pay into Court instalments due, and interest according to the contract, the subject being a coal-mine; and the purchaser in possession, and working it.

By an agreement in writing, dated the 2d of January, 1810, the Defendant contracted to purchase all the coal under the Plaintiff's estate in Denholme, with liberty to use the water, and get stones for what pits and erections might be necessary for working the colliery, at the price of 5000*l.*, to be paid with interest in the following manner: the first instalment, 1000*l.*, at the end of two years from

the date, with interest upon that sum and the remainder of the purchase-money; the second, the like sum of 1000*l.*, with interest in like manner at the end of three years: and similar payments at the end of four, five, and six years; Lodge to pay all damages to the tenants; a conveyance to be made with all proper and usual covenants, stipulations, and agreements, on behalf of both parties; the interest upon the above sums to be paid half-yearly, and to commence this day; and the payment of the purchase-money and interest to be secured upon the coals and by bond; and sufficient pillars to be left according to the custom of the country.

The Bill prayed a specific performance. The Answer admitted, that immediately after the agreement the Defendant entered, erected the necessary works, and has continued to work the colliery: that he has paid to the Plaintiff one half-year's interest, due on the 2d of July, and is ready and willing to pay the second half-year; and would have paid it, if no objection had been made by the Plaintiff to performing the agreement; but the Plaintiff has

* objected to perform his part according to the true intention; denying, that the Plaintiff has offered to perform and made applications to the Defendant, and that he has refused to pay the farther interest, or execute the security, &c.; and insisting, that he was always ready to perform. [* 451]

A Motion was made by the Plaintiff, for an Order upon the Defendant to pay into Court the sum of 1000*l.*, being the first instalment, due on the 2d of January, 1812, and to pay to the Plaintiff 375*l.*, being the interest upon the purchase-money, due on the 2d of January and the 2d of July, 1811, and the 2d of January, 1812, respectively.

(1) Sir *Samuel Romilly* and Mr. *Thompson*, for the Plaintiff, in support of the motion, relied upon the nature of the subject, and the admissions, that the Defendant has been in possession and was working the colliery, and had paid one-half-year's interest; by his answer making no objection to the title; and submitting to perform the contract.

Mr. *Heald*, for the Defendant, said, there was no precedent for this application; and the Plaintiff might protract the suit, and thus obtain the payment of all the instalments, before he executes the conveyance; which is inconsistent with the clear effect of the contract.

The MASTER OF THE ROLLS [Sir *WILLIAM GRANT*] said, he thought the application reasonable; as the Defendant was in possession, and making a benefit by working the mines.

The Order was made for payment of the money in a month.

A PURCHASER may entail awkward consequences upon himself, by taking possession of an estate he has contracted for, before the title is cleared: see, *ante*, notes 2, 3, to *Calcraft v. Roebuck*, 1 V. 221. The rules applicable to ordinary purchases of real estate may require modification in many respects, when the subject of contract is a colliery: see the concluding passage of note 2 to *Wren v.*

Kirton, 8 V. 592. And, where a vendee has taken possession of, and is exhausting, a coal mine, the propriety of ordering him to pay his purchase money into court may be still more evident than when the property in question is an ordinary landed estate; but, even in the latter case, a vendee cannot, without a special agreement, retain possession of the estate, whilst the title is under discussion, and also keep the purchase money in his own hands: see the note to *Clarke v. Wilson*, 15 V. 317.

[* 452]

WAY v. FOY.

[1812, FEB. 13.]

DECREE not suspended by an Appeal without a special ground. the subject of discretion (a). A legacy therefore paid out of Court upon security notwithstanding an Appeal.

Object and effect of the late Order of the House of Lords, requiring the parties to Appeals to print their Cases forthwith, applying generally to all Appeals, to check the abuse of appealing merely for delay and vexation, [p. 453.]

Signature of Counsel on Appeal to the House of Lords equivalent to the Certificate on Appeal to the Lord Chancellor, [p. 453.]

THE Defendant having appealed to the House of Lords from a Decree pronounced by the Lord Chancellor, against him, as executor, for payment of a legacy, the Plaintiff moved, that the sum of 1970*l.* 18*s.* 1*d.* paid into Court under an Order on account of the legacy, should be paid out on giving security to refund, if the Decree should be reversed.

Sir Samuel Romilly, Mr. Hart, Mr. Leach, and Mr. Cooke, in support of the motion, contended, that the resistance to this Decree was obstinate. The rule, that an Appeal does not stay proceedings, under a Decree without a special ground, is established by the cases of *Willan v. Willan* (1) and *Waldo v. Caley* (2): in the latter case the Court giving so much credit to the Decree as to let the money be distributed in a way, that did not admit of its being recalled. At Law, there is a certain rule upon this subject: but here and in the House of Lords it rests in discretion, limited only by the late decisions. The Plaintiff, to whose title no objection can be suggested, has a right therefore to have this legacy paid even without security; but is contented to take it in this way. The strict rule is, that the Decree shall be executed; and in case of a reversal the Defendant must get the money back, as he can. Upon Appeals to the House of Lords the signature of Counsel is not required, as upon Appeals to this Court; though such an extension of that rule would be very useful; as the Certificate of Counsel [* 453] * could not have been obtained to many of the Ap-

(a) 2 Smith, Ch. Pr. 68, and notes; 1 Barbour, Ch. Pr. 388, 389, 390.

(1) *Ante*, vol. xv. 226; *Huguenin v. Baseley*, and the Order of the House of Lords 180, 184.

(2) *Ante*, vol. xvi. 206. See *The Warden and Minor Canons of St. Paul's v. Morris*, ix. 316, and the note.

peals, which, having been put in merely for delay, were under the late regulation of the House withdrawn at the commencement of the last Session.

Mr. *Richards* and Mr. *Heald*, for the Defendant, insisted, that a sum of money could not be paid over pending an Appeal: at least ample security, to be approved by the Master, must be substituted for the security of the Court.

The Lord CHANCELLOR [ELDON].—The Committee of the House of Lords in making the late Order, requiring the parties to print their Cases, went upon a ground, which has been so much misunderstood, that those parties whose cases stood very low, conceived, as they could not be immediately heard, there was no necessity to print them. The meaning of the Committee, which was adopted by the House, was, that, as there was great reason for suspecting, that the object of many Appeals was merely delay and vexation, it was right, that means should be provided to enable the House to ascertain the merits of each case, and, considering the point and nature of each, to make some arrangement for hearing those, which the parties intended to have heard.

It is true, there is not the formal Certificate of Counsel upon an Appeal to the House of Lords: but the signature of Counsel is always understood to import that: and it is sufficient to observe, that probably there will in future be no misunderstanding upon this; as I know it is intended to propose a regulation, that the engagement shall be in expression what it is understood to be in effect.

* The consequence of requiring the cases to be printed [* 454] has been, that of forty cases the parties admitted there was so little in them, that they prayed leave to withdraw rather than incur that expense. In many other instances they averred openly, that Writs of Error were brought merely for delay; and, that delay being obtained, without any intention of prosecuting the Writ of Error, until the Appellant became bankrupt, the Respondent then proved a debt under the Commission without any objection. Thus the accumulation of Appeals was considerably reduced by the effect of that investigation.

The result is, that it is absolutely necessary, that the House should take some temperate measures to secure that jurisdiction from the scandalous abuse, that is practised; admitting, that any interference with the right of Appeal is a delicate subject, and to be applied with jealousy.

This is a decision of my own: which upon reflection I cannot think wrong; and, this being in the discretion of the Court, I shall certainly let the money go out upon sufficient security being given to the Master to return it, if the Decree shall be reversed.

It is of the utmost importance that proceedings under a decree should not be stayed by an appeal, unless there are special circumstances in the case: see note 4 to *The Canons of St. Paul's v. Crickett*, 2 V. 563. And the signature of counsel is required as a pledge that an appeal is not brought merely for delay: *Monkhouse v. The Corporation of Bedford*, 17 Ves. 381.

HANSARD v. HARDY.

[1812, JAN. 27; FEB. 3.]

REDEMPTION decreed against the heir of mortgagee and a purchaser with notice upon acknowledgment of the mortgage within twenty years before the bill in transactions with other persons, not with the heirs of the mortgagor (a).

Dismissal of a Bill for redemption for want of prosecution has not the effect of Foreclosure; not preventing another Bill, [p. 460.]

Whether purchaser of copyhold must be presumed to have notice of every thing on the Court Rolls, *Quere*, [p. 462.]

AFTER the Decree, pronounced in the cause of *Hardy v. Reeves* (1), declaring, that Fryer was at the time of his death entitled only to a redeemable interest in the copyhold premises, this suit was instituted, in 1802, by the heirs of the original mortgagors for a redemption; insisting upon the acts of the mortgagees by the deeds of 1773 and 1786, treating the estate as redeemable. The amount due to Fox had been ascertained by the Master's Report. The deed between him and Reeves expressly referred to the admittance of Fryer under the surrender by Errington.

Mr. *Leach* and Mr. *Daniell*, for the Plaintiff.—The Decree pronounced by Lord Alvanley in 1799, having decided only, that this was in the year 1768, a redeemable interest, some act of Mary Usher since that period must be shown, the effect of which is to continue to the mortgagor, the right of redemption. That effect is produced, if the mortgagee has within twenty years dealt with a third person, in that transaction treating the property as in mortgage; assigning it, for instance, as a mortgage, expressly subject to the equity of redemption: could the assignee, taking it as a mortgage, say, that, as the mortgagor is not a party to the transaction, his equity [* 456] of redemption is gone? That is equally * inconsistent with principle and authority. *Smart v. Hunt* (2) is precisely that case: the mortgagor had been out of possession forty-one years: but within twenty years there was an assignment of it as a mortgage. The case before Lord Kenyon of a party declaring within twenty years, that it was a mortgage title, but proceeding to say he held it irredeemable, was not an admission, that it was then a redeemable mortgage, but that commencing in mortgage it had become irredeemable. The clear conclusion is, that any dealing,

(a) In analogy to the Statute of Limitations, an uninterrupted possession by the mortgagee for twenty years, will create a presumption that the right of redemption has been abandoned. But, generally speaking, no lapse of time will bar the right to redeem, so long as the mortgage has been treated between the parties as a subsisting mortgage and security only, particularly if there be within that period any account or solemn acknowledgment of the mortgage, as subsisting. *Dexter v. Arnold*, 1 Sumn. 109; *Gordon v. Hobart*, 2 Sumn. 401; *Ross v. Norvell*, 1 Wash. 17; *Marks v. Pell*, 1 Johns. Ch. 594; *Demarest v. Wynkoop*, 3 Johns. Ch. 1291; 1 Powell, Mortgages, by Coventry and Rand, pp. 370, 371, note D.; p. 377, note G.; p. 379-382, note H.; p. 385, note (1); p. 386; 1 Hilliard, Abr. 290, 291.

(1) *Ante*, vol. iv. 466; v. 426.

(2) *Ante*, vol. iv. 478, n.

whether with the mortgagor himself, or in a transfer to a third person, as upon a mortgage interest, will maintain and continue that interest. The deeds of 1786 therefore, treating this as a mortgage security, are decisive against all claiming under Mary Usher.

Sir *Arthur Piggott* and Mr. *Johnson*, for the Defendants the Hardys. Mr. *Hart* for the Murgatroyds and purchasers under their marriage settlement.—In this case there is no trace of any account: no communication, receipt of interest, &c.: no transaction whatsoever with the mortgagor: no circumstance, except a settlement, in 1773, upon the marriage of the residuary legatee, and a deed in 1786, in which it is said this was treated as a mortgaged estate; and no step taken until this Bill filed in 1802, after a period of thirty-four years from 1768; when the Decree in the other cause declares it redeemable. These parties are now therefore too late for redemption; showing merely, that at certain periods, when unquestionably the right to redeem was not determined, being within twenty years, this was named as an estate in mortgage. There is no evidence, that it was so treated since 1788; when the twenty years

*expired; and fourteen years more have elapsed. As to [*457] the effect of the two deeds relied on, they were merely family transactions, in no respect referable to the mortgagor. The fact of accounts kept, or an acknowledgment, that the estate was in mortgage, within twenty years, is not sufficient, where it occurs in the family of those entitled; nor will such an acknowledgment of a mortgage title do, if accompanied with a protestation, that there is no right to redeem. If however they are permitted to redeem, what are to be the terms? How can any inquiry now ascertain the expenditure; which is not the common expenditure of a mortgagee, but improvement by re-building, draining, &c.? The effect of allowing redemption at this distance of time, after the death of all the parties, if given as in the ordinary case, must be considered. The account must therefore be taken from the shortest date. The Court is compelled by the strict rule to give relief; and no case can be less entitled to favorable consideration.

Mr. *Richards* and Mr. *Agar*, for the Defendants Fox and Barnes.—Whether the Plaintiff, or the other Defendant, succeeds as to the equity of redemption, the claim of this Defendant under the surrender to him on the 3d of April 1789, by which he is in possession of the legal estate, must be established. All the time must be accounted against a mortgagor, guilty of such laches, suffering an adverse possession, first by Fryer, then by those who represented him, and lastly by Fox. The acts of the residuary legatee in her own family cannot affect the legal estate vested in this mortgagee; of which he cannot be deprived until all that is due to him has been paid.

*Mr. *Leach*, in reply.—The distinction attempted in [*458] favor of the Defendant Fox, that he must be indemnified at least for the money he advanced, cannot be maintained. Lord *Alvanley* considered him entitled upon the common principle, pro-

tecting a purchaser without notice. The question was, not whether he had notice, that this was originally a mortgage title, but, being so, whether it descended to the heir or the personal representative of the mortgagee. The notice by which he was to be affected, was notice of the equitable title of the personal representative: but the question now is, what is his case against the mortgagor. Equitable notice is not confined to mere knowledge of a particular fact; but comprehends the capacity of acquiring knowledge by taking steps, which a cautious and prudent man would take: if, therefore, by reasonable diligence he could acquire notice, he shall in Equity be held to have it: otherwise a person, suspecting a defect of title, would shut his eyes, in order to avoid notice. Fox was therefore bound to examine the Court Rolls; to see by what title his mortgagors, or their ancestors, were admitted; and he would there have found, that Fryer was admitted expressly to a mortgage title under the families of Hansard and Lewis. It cannot be represented, that the purchase of a copyhold title is not affected with notice of all, that appears upon the Court Rolls.

As to limiting the account, it cannot be maintained, that as between mortgagor and mortgagee this principle of delay enables the latter to keep all the rents and profits, that he has possessed, and to insist on being paid again, as if he had not been paid by receiving them.

[* 459] *The MASTER OF THE ROLLS [SIR WILLIAM GRANT].—

Although I thought there was very little room for doubt upon this question, I wished to have an opportunity of inspecting the different deeds. The Bill was filed for the redemption of a mortgage, made in 1732. The Defendants allege, that the redemption is barred by the length of time. It is admitted, that the mortgagee had been in possession for more than twenty years before the bill filed. There is no evidence of any interest paid, or of accounts rendered, or kept, by the mortgagee within that period: but the Plaintiffs allege, that within that period the mortgagees have treated it as a subsisting mortgage; and therefore cannot contend, that it had become irredeemable.

It is admitted on all sides, that the mortgage must be taken to have been redeemable in 1768, the time of Robert Fryer's death. Then the Plaintiffs say, that by deeds executed in 1773 and 1786 the mortgagee treated it as a subsisting mortgage; and that within twenty years after the latter period, viz. in 1802, the Bill for a redemption was filed; and therefore the Plaintiffs come in sufficient time. Those deeds certainly do in the plainest and most explicit terms treat this as a mortgage interest. It is the money due upon the mortgage, that is the subject of the settlement, made by the first of them, and of the security, created by the second. The mortgaged premises are assigned by each; but it is the money due thereon, that is the direct subject of both.

It is however said for the Defendants, that these acknowledgments, made in dealings with third parties, are totally foreign to

the mortgagor; and that the acknowledgment, which is to operate so as to bar the objection from length of time, should be an *acknowledgment arising out of some transaction directly between mortgagor and mortgagee. How far that would be the more reasonable rule, I shall not now examine: but certainly it is not the established one. In the case of *Smart v. Hunt* (1) it was in an assignment to a third person that the mortgagor found the evidence of acknowledgment, upon which he was relieved. In this very case of *Hardy v. Reeves* (2) it was upon the terms of the assignment from Errington to Fryer that Lord Alvanley mainly relied, as the ground for holding the mortgage to be then redeemable. To that assignment the mortgagor was a stranger. In *Ord v. Smith* (3), though the main ground of the decision was fraud, the Court expressed an opinion, that the testator's saying in the Will, that, if the mortgage should be redeemed, the money should go, &c. would have been sufficient to preclude the objection from length of time; as that declaration was made within the twenty years. Upon the established doctrine of the Court therefore the recognition in the deed of 1786 of this, as a subsisting mortgage, is sufficient to prevent the mortgagee from now setting up the length of time against the right of redemption (4).

An attempt was made to argue, that the dismissal of a Bill, formerly filed by the mortgagee for redemption, would operate as a foreclosure: but that Bill was dismissed for want of prosecution; and it is impossible to contend, that the effect of such a dismissal is the same as a Decree of dismissal for non-payment of the mortgage money at the day appointed. A dismissal for want of prosecution does not prevent the filing of another Bill for the same matter (5).

* Another question is, whether as against the present Plaintiff the mortgage to Fox can be set up as a lien upon these premises. The Decree in 1799 cannot affect that question. The mortgagor was not a party to that cause; and therefore was not directly bound by the Decree: but the principle of that decision is not applicable to the present case. It was the personal conduct of the Hardys, that precluded them in Lord Alvanley's opinion from questioning a security made during the time Reeves was permitted to act as the ostensible owner. The Hardys, having a questionable title, suffered themselves to be turned out of possession, and acquiesced during several years in the possession obtained by Reeves. This was considered an acquiescence in the claim of ownership by Reeves; as he had nothing to do with the estate, unless he was owner: but a mortgagee may have possession without pos-

(1) *Ante*, vol. iv. 478.

(2) *Ante*, vol. iv. 466.

(3) *Sel. Cas. in Chan.* 9; 2 *Eq. Ca. Ab.* 600.

(4) See *post*, *Barron v. Martin*, vol. xix. 327, and the note, 331.

(5) See *Beames El. Pl. Eq.* 210, 11. Dismission of Bill of Redemption on default of payment under the Decree operates as a Foreclosure: *ante*, vol. xi. 199.

sessing as owner; and the submission of the mortgagor to be turned out of possession, and his acquiescence in continuing out of possession, are no recognition, that the possession obtained and kept is that of the equitable owner.

Against the present Plaintiff therefore the case of Fox is of a totally different nature from that, which he had to make against Hardy and his wife. Their personal conduct excluded them from disputing his security: but as to the other there is nothing of conduct, but the mere circumstance, that the mortgagor is out of possession. It was necessary for Lord Alvanley to determine the question as between the parties then before the Court. It was not then certain, whether the heirs of the mortgagor would come to redeem. It was not therefore nugatory to decide in favor of Fox as against the Hardys; although another party might come in, and deprive him of the estate; as the heir might never have thought it worth his while to redeem.

[* 462] * The question between Fox and this Plaintiff is merely, whether Fox is to be considered a purchaser without notice, and without entering into the question, which was made at the Bar, how far a person, purchasing a copyhold estate, must be presumed to have notice of every thing on the Court Rolls relative to it (1), it is sufficient to say, that in the deed of 1788, between Reeves and Fox, there is an express reference to the admittance of Fryer under the surrender by Errington. There is direct notice of that admittance; and consequently of the surrender, upon which it proceeds, and to which it referred. The surrender to Fryer was made subject to such equity of redemption as the heir of Hansard had; and Fryer was admitted to hold to him and his heirs, according to the custom of the manor, and subject to such equity of redemption. If it were material, it might be contended, that not only Fox had notice, that this was a mortgage title, but that it was at least doubtful, whether at the time of Fryer's purchase it was not a redeemable title. He cannot say, he took it as clearly irredeemable; as the utmost that can be represented with reference to the manner of the surrender, is, that it was treated as a subject of doubt, whether there was a right to redeem or not: but the material question is, whether there was notice, that it was a mortgage title; as whoever takes such a title must run the risk, whether it is redeemable, or not. It is not sufficient for him to say, he thought it irredeemable. If he is wrong in that, his erroneous judgment will not avail him, and supply the place of title. What he has notice of is, that an equity of redemption was reserved; which is the Plaintiff's title, upon which he now seeks to redeem; and therefore, if the purchaser has notice of that, and the Court thinks the equity of redemption still subsists, he has notice of the Plaintiff's title. All he says is, it is true, he had notice of the title; but he did not know, that the Plaintiff could at this distance of time avail himself

(1) See 3 Mad. 168.

of it. Fox therefore cannot against this Plaintiff take advantage of his mortgage.

Being of opinion that the right of redemption is not barred by the length of time, and that the equity of redemption is not clogged by Fox's mortgage, the redemption must take place upon the ordinary terms.

SEE, *ante*, the notes to S. C., 4 V. 466.

PAGE v. LEAPINGWELL.

[ROLLS.—1812, FEB. 18.]

DEVISE in trust to sell, but not for less than 10,000*l.*, and to pay several sums, amounting to 7800*l.* and the overplus moneys arising from the sale to A. A specific legacy of 10,000*l.*, and the sale producing less, A. and the others to abate: legacies to charity void by the Statute 9 Geo. II. c. 36, fell into the general residue (a).

Indefinite bequest of the dividends gives the absolute property of stock (b).

Will not to be construed by something *dehors*, as by the state of the property, where no latent ambiguity (c), [p. 466.]

Different construction of the word "surplus" from that, which it commonly bears, inferred from the expression of the Will, [p. 466.]

BENJAMIN PUGH by his Will, dated the 10th of December, 1797, gave, devised, and bequeathed, to Sir Thomas Hyde Page and two other trustees, their heirs, executors, &c. his house called Mitford Castle, with its appurtenances, and all the furniture, goods and chattels, on or about the same, and all other his messuages, lands, &c. in the parish of South Stoke, upon trust that they shall, as soon as conveniently may be after his decease, sell and dispose of by auction or otherwise the said messuages, lands, hereditaments, furniture, goods and chattels, for the best price and prices that can or may be had for the same; but the same is not to be sold for less than the sum of 10,000*l.*; directing, that until the sale his wife Ann Pugh should enjoy the said lands, furniture, &c. for her own use; and from and after the sale, he directed his trustees out of the moneys arising by such sale, as aforesaid, in the first place to lay out the sum of 3,000*l.* in the purchase of a benefice or ecclesiastical living for his godson, the Reverend George Leapingwell, to the use

(a) For the subject of specific legacies, see *ante*, note (a) *Kirby v. Potter*, 4 V. 748. As to the inclination of the Court against specific legacies, see *ante*, note (a) *Coleman v. Coleman*, 2 V. 639.

(b) See *ante*, note (b) *Phillips v. Chamberlayne*, 4 V. 51.

(c) Parol evidence is admissible to explain latent ambiguities and to apply an instrument to its subject. 1 Greenl. Ev. § 297, 301. As in the case of Wills, see *ante*, note (b) *Baugh v. Read*, 1 V. 257. See 2 Starkie, Evid. 569 (5th Am. ed.); *Shelton v. Shelton*, 1 Wash. 56; *Dewit v. Yates*, 10 Johns. 156. Parol evidence is admissible to show the state of his property, when the testator made his Will. *Hyde v. Price*, 1 Coop. 208; *Webley v. Langstaff*, 3 Desaus. 509.

of him and the heirs male of his body, with limitations over in default of such heirs male; and he directed, that his trustees by and out of the moneys, arising by such sale as aforesaid, shall lay out the sum of 4000*l.* in the purchase of such lands in the county of Essex as his nephew Thomas Shuker shall make choice of; and he directed likewise, that his said trustees by and out of the moneys arising from such sale as aforesaid, do place out the sum of 500*l.* in their names in the public funds; and pay the interest and dividends arising from the same to Mrs Sarah Ostler for her life; and on her death do pay the said sum of 500*l.* equally amongst the five children of Sir Thomas Page, or such of them as shall be living at her death. The Will then, after giving to his wife Anne Pugh 100*l.* in trust for Anne Perry, and two sums of 100*l.* each for the poor of two parishes, all to be paid out of the moneys arising from such sale aforesaid, proceeded thus: "And after payment of the legacies above mentioned I hereby order and direct my said trustees to lay out and invest all the overplus moneys, arising from the sale of the said messuages lands and tenements in the public funds, and do and shall pay and apply the interest and dividends arising from the same to my said wife Anne Pugh and the said Sir Thomas Hyde Page equally between them, as tenants in common."

After a specific disposition of some leasehold premises, and some annuities and legacies, came the following residuary clause: "All the rest, residue and remainder of my estate and effects both real and personal whatsoever and wheresoever, not hereinbefore by me disposed of (after payment of my debts, funeral expenses, and the expense of proving this my Will, annuities and legacies) I give, devise, and bequeath unto the said George Leapingwell and [* 465] Thomas Shuker, their heirs, executors, administrators, and assigns, to be equally divided between them share and share alike as tenants in common.

The testator died in 1798; and his widow in 1811.

The bill was filed by the trustees; praying the establishment of the Will, and directions for carrying the trusts into execution; and, the produce of the sale of the estates, &c. which was directed by a Decree, being less than 7000*l.*, the principal questions, when the cause came on for farther directions, arose upon the disposition of the "overplus moneys arising from the sale:" first, as to the subject of that disposition; secondly, as to the interest, that passed by it. Another question, whether Shuker took any, and what, interest in the lands, directed to be purchased with the sum of 4000*l.*, was settled by compromise; Shuker taking three fourths of that sum, and Leapingwell one fourth.

Sir *Samuel Romilly*, for the Plaintiff, Sir Thomas Hyde Page: Mr. *Richards*, Mr. *Hart*, Mr. *Leach*, Mr. *Hall*, and Mr. *Bell*, for the several Defendants.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—I think the same construction does not apply to this disposition of 10,000*l.* as would be applicable to a general residuary clause. The question

is, whether the testator did not assume, that he had 10,000*l.* to distribute : and made his distribution upon that supposition ; just as if he had said, the remaining 2000*l.* should be laid out upon trust for one for life, with remainder, &c. If that is so, the consequence is clear. As to the mandatory clause, I refer to it only as showing the intention ; and that he made his Will upon the clear supposition, that he had at least 10,000*l.* to portion out [* 466] in this manner. He thought there might be more ; and in that event he meant to give these parties the surplus, whatever it might be. Lord Cowper went much farther in the case of *Dyose v. Dyose* (1) ; where without any intention disclosed upon the Will he collected it from the state of the property ; as the testator must have known at the time of making his Will of what his property consisted ; and meant to give the surplus as a legacy to his eldest son, and not to let him alone run the risk of any subsequent diminution of the estate.

It is true, that has been disapproved, and justly, by Lord Thurlow in *Fonnereau v. Poyntz* (2) ; as construing a Will by something *dehors* : but I am not doing that : but, collecting the intention from the Will itself, I say, the testator meant, not an indefinite surplus, but a precise legacy to a certain extent, with a chance of something more. It is no new thing to put a different construction upon the word "*surplus*," from that, which it commonly bears. In the case of *The Attorney General v. Johnstone* (3) Lord Camden put a restrictive construction upon the words "*remainder of my personal estate*;" a large sum having lapsed : but it was quite evident he meant to give a very small surplus. Why may not I infer from the expressions in this Will, that the testator did not mean, what the word "*overplus*" usually imports, viz. whatever shall turn out to be the overplus ; but that he was contemplating a certain overplus ; and was making his disposition accordingly ?

I conceive the true intention to have been, that these person should take as specific legatees ; and * therefore [* 467] they must abate among themselves. As to the 200*l.* bequeathed as charitable legacies, the disposition is void. Upon the same ground, on which the Plaintiff Page and the executors of the widow succeed as to the rest, they must fail in that ; which must therefore lapse.

As to the question, whether the absolute interest is given in the Stock, or an interest for life only, I think it is clearly the absolute interest. An indefinite gift of the dividends gives the absolute property of stock (4).

The Decree declared, that, the Milford Castle estates having been

(1) 1 P. Will. 305.

(2) 1 Bro. C. C. 472 ; see 478.

(3) Amb. 577.

(4) Fearn (Butler's ed.) 465 ; *ante*, *Philips v. Chamberlaine*, vol. iv. 51, and the note, page 59.

sold for less than 10,000*l.*, the several legacies, payable out of the moneys to arise by such sale, viz. 3000*l.*, 4000*l.*, 500*l.*, 100*l.* 100*l.*, and 100*l.*, making together the sum of 7800*l.*, and the sum of 2200*l.*, being the residue of the said sum of 10,000*l.* bequeathed to the Plaintiff Sir Thomas Hyde Page and the late Anne Pugh, ought to abate proportionably; and that the two charitable legacies of 100*l.* each are void by the Statute (1); and sink into the general residue, not specifically bequeathed; and it was directed, that what the Master shall certify to be due in respect of one moiety of the sum of 2200*l.*, the residue of the said sum of 10,000*l.* charged upon the money to arise by the sale, after such apportionment and contribution as aforesaid, shall be paid to the Plaintiff Sir Thomas Hyde Page; and the other moiety to the Defendants, the executors of Anne Pugh.

1. LORD COWPER's decision in *Dyose v. Dyose*, was not only disapproved by Lord Thurlow in *Fonnereau v. Poyntz*, as Sir W. Grant, (agreeing in the justice of that censure) observed in the principal case; but Lord Eldon has informed us, in *Ex parte Chadwin*, 3 Swanst. 387, that it seemed to him, Lord Thurlow had, in *Humphreys v. Humphreys*, 2 Cox, 184, gone the length of absolutely deciding against the case of *Dyose v. Dyose*. Lord Eldon pronounced no positive opinion on the subject on broad general principle, but held, that in the case before him (*Ex parte Chadwin*) there were supervening circumstances sufficient to lay ground for the doctrine of *Dyose v. Dyose*, though not on the reasoning suggested in that case. The special circumstances relied on were, transactions by which the priority, that pecuniary legatees are entitled to, in preference to residuary legatees, appeared to have been waived.

2. As to the only purposes for which any matter *dehors* a will ought to be received as evidence in a suit arising out of such will, see, *ante*, note 5 to *Druce v. Dennison*, 6 V. 385, adding to the references there given, and the cases cited, *Barkesdale v. Gilliatt*, 1 Swanst. 565, where it is judicially laid down, that calculations of property are clearly evidence in a case in which the testator has stated on his will, how, as he imagines, his property will stand after the particular dispositions which he has made: and see *Doe v. Gillard*, 5 Barn. & Ald. 788.

3. A bequest of the residue, the remainder, or the overplus, of a testator's estate, may be confined in its operation, so as to include only a surplus to a residue to a particular limited amount, when such appears clearly to have been the intention of the testator: see note 6 to *Pickering v. Lord Stamford*, 2 V. 272.

4. That charitable legacies, at all savoring of *reality*, are void, see the notes to *Grievs v. Case*, 1 V. 548.

5. For a conclusive reason why an indefinite gift of dividends carries the absolute property in stock, see note 3 to *Kirby v. Potter*, 4 V. 748.

CODNER v. HERSEY.

[1812, FEB. 21, 28.]

ORDER on Plaintiff's Motion, that Defendant shall be at liberty to put in his Answer without oath or signature, of course, if Defendant is in this Country; if abroad, his consent required (a).

A MOTION was made by the Plaintiff, as of course, that the Defendant may be allowed to put in his answer without oath or signature.

Mr *Wakefield*, in support of the Motion said, that before Lord Hardwicke's Order answers were generally put in without signature (1); referring to the cases of *General Lake* and *Sir Henry Gwillim* (2) and *Harding v. Harding* (3).

The Lord CHANCELLOR [ELDON] said, strictly the Defendant should consent; and directed the Order to be, that upon the Motion of the Plaintiff the Defendant should be at liberty to put in his answer without oath or signature.

Feb. 28th. The Register still requiring a consent, and having considerable doubt of the propriety of thus relaxing the practice, merely for convenience, the Defendant being in this Country, and under no special circumstances, it was mentioned again: when the Counsel said, it was requiring a consent for a man to do what he might do, if he pleased.

* The Lord CHANCELLOR confirmed the Order, as it was [* 469] pronounced; observing, that it secured the consent of the Defendant, being in this Country; but, where the Defendant is abroad, the Court requires some authority to show, that he is willing.

SEE the note to ——— v. *Lake*, 6 V. 171.

(a) The answer must be actually signed by the Defendant putting it in, although an answer on oath is waived, unless an order has been obtained allowing it to be taken without signature. 1 Barb. Ch. Pr. 141; *Denison v. Bassford*, 7 Paige, 370. The Court has sometimes, under special circumstances, directed the clerk to receive an answer, though it has not been signed by the defendant. *Dumond v. Magee*, 2 Johns. Ch. 240. Where the signature is waived by the plaintiff, the answer may be filed without it. *Fullon Bank v. Beach*, 2 Paige, 307; S. C. 6 Wend. 36.

(1) This must be confined to Answers taken by Commission in the Country; the Order stating the constant practice for Defendants, who swear their Answers or Pleas before a Master of this Court, to sign the same at the time of taking such Answers or Pleas. The Order is printed 2 Atk. 290, and in the General Orders in Chancery, by Mr. Beames, 451; who has collected the authorities.

(2) *Ante*, vol. vi. 171, 285; see the note, 172.

(3) *Ante*, vol. xii. 159.

GILPIN v. LADY SOUTHAMPTON.

[1812, FEB. 24; MARCH 7.]

EFFECT of a Decree against Administrator, entitling him to an Injunction against the suit of a creditor, qualified by requiring an account of the Assets either by the Answer or affidavit.

Peeress, answering upon honor, in exactly the same situation as another Defendant answering on oath.

THE usual Decree having been obtained at the Rolls by consent upon the Bill of creditor against the Defendant, as administratrix of Lord Southampton, a Motion was made for an Injunction to restrain a creditor, proceeding at Law (1).

Sir *Samuel Romilly*, in support of the Motion, and Sir *Arthur Piggoth*, for the creditor, proceeding at Law, referred to the rule introduced by the Lord Chancellor (2), requiring the executor to state by affidavit, if he has not stated by answer, what assets are in his hands. It was erroneously supposed, that the answer was taken without oath: but it was filed in the usual course, as a Peeress, upon honor.

The Lord CHANCELLOR [ELDON].—Ever since I have known this Court suits have been allowed against executors, in truth by executors in the name of the creditor against themselves; and that was allowed upon a principle of this sort; that, as executors have vast powers of preference at Law, the Court has not disapproved of their coming in the shape of an application by a creditor to give a judgment to all the creditors, and to secure a distribution of the assets without preference to any. For that reason this sort of suit has been allowed; and, when once the Decree was made, it was impossible to permit a creditor to go on at Law. Considerable inconvenience, however, arose from the practice, as it prevailed: the executor frequently applying for the purpose, not of preventing a preference, but of preventing the payment of any creditor, and keeping the assets himself. That struck me as so improper, that I introduced the rule, where the answer does not state, what the assets are, that the executor shall be called upon to state them by affidavit; and then I granted the Injunction, bringing the money into Court, and making such Order as the state of the assets required.

When this Motion was first made, it did not occur, that this might be the answer upon honor of a Peeress; who stating what the assets are, is exactly in the situation of any other Defendant, making that statement by answer upon oath (3). I desire therefore to see the answer; and then will make the Order accordingly.

March 7th. The Lord CHANCELLOR, observing, that the Answer

(1) *Jones v. Jukes*, ante, vol. ii. 518, and the note.

(2) *Parton v. Douglas*, ante, vol. viii. 520.

(3) *Dutton v. Ellis*, 1 Jac. & Walk. 524.

was very full and comprehensive, particularly as to the personal estate, both receipts and payments, made the Order, restraining the Action on payment of costs up to the time when the creditor had notice, and the costs of the application.

1. WHEN a court of equity has taken into its own hands the administration of a testator's assets, and the suit has proceeded to the length of a conclusive decree as to the appropriation of those assets, an injunction may be obtained against a subsequent judgment of a court of law, which would go to alter the course of administration prescribed by the decree: see, *ante*, note 7 to *Perry v. Phelps*, 1 V. 251. But an executor, in order to obtain an injunction against proceedings at law, must set forth the balance of assets remaining in his hands, which, unless special reasons are shown to the contrary, will be ordered into court: see note 3 to *Eagleton and Coventry v. Kingston*, 8 V. 438.

2. The House of Lords having referred it to a committee of privileges to consider, "whether a peer of Parliament is to answer upon oath, or upon his honor only," the Earl Marshal, on the 6th of May, 1628, reported, that although the reference might seem general, the committee had considered only of the answers of peers in courts as *defendants*; and that, after perusing all the precedents for their answers in *this kind*, the committee agreed, *una voce*, that "the nobility of this kingdom, and the lords of the Upper House of Parliament, are of ancient right to answer in all courts as *defendants*, upon protestation of honor only, and not upon the common oath:" see the note to *The Earl Lincoln's case*, W. Jones, 154. An order in conformity with the report was made on the 31st of December, 1640. And, where a defendant, entitled to privilege of peerage, is ordered to produce deeds or other instruments, merely as supplementary to his answer, this production, like the answer which it is designed to perfect, may be given upon honor: *Duke of Hamilton v. Lady Gerrard*, Prec. in Cha. 92. So the answer of a peer, upon his protestation of honor, may be read upon the discussion of the question of costs: *Dawson v. Ellis*, 1 Jac. & Walk. 526. And when the answer of a peer is required to be perfected, not by the production of documents as above stated, but by an examination on interrogatories before a Master, or any other proceeding of a similar nature, in such cases affirmation upon honor is all that can be required. But, where a peer is examined, not as a defendant, but as a *witness*, or where he is required to make an *affidavit*, he must be put on his oath: *Meers v. Lord Stourton*, 1 P. Wms. 146; *S. C.* 1 Dick. 21, both which reports, it should be observed, ought to be read, in order to understand the whole of Lord Keeper Harcourt's decision. In the report in Peere Williams, his lordship is stated to have said that, where a peer is examined on interrogatories in a suit where he is *plaintiff*, the examination must be on oath. The report in Dickens states that, where a peer is *defendant*, his examination on interrogatories to perfect his answer is to be upon honor, as was laid down in *Hamilton v. Gerrard*, above cited. That such was the real determination in *Meers v. Lord Stourton*, appears also from a note of that case subjoined in Mr. Forrester's ms. to a report of the case of the *Earl of Warrington v. Leigh* (heard before Lord King, C., on the 17th May, 1732), in which this point came under discussion. The same distinction holds as to the production of documents: if a peer be a plaintiff coming for equity, he must do equity, and allow the other side the benefit of a discovery, and that in a *legal manner*, upon his oath; but, if the peer be brought into court as defendant, his protestation of honor is all that can be insisted on. That a peer, when examined as a witness, must be sworn was determined by the opinion of all the judges, in the case of *The Earl of Shaftesbury v. Lord Digby*, 2 Mod. 99.

WHITE v. KLEVERS.

[1812, FEB. 24.]

No Injunction until Appearance or Default.

THE Bill was filed by consignors of goods to the Defendant at Riga for sale; charging fraudulent accounts rendered of sales at lower prices than were actually produced; and in some instances sales by collusion at Riga at a loss, which at Memel would have produced a profit; praying a discovery, account, and an Injunction to restrain an action, brought by the Defendants for the balance of their account.

Sir Samuel Romilly and Mr. Roupell, for the Plaintiffs, moved for the Injunction, before appearance of two of the Defendants, residing abroad, and before answer of the third, in this Country, upon affidavits of the facts charged, and belief of misrepresentation as to the produce of the sales, &c. and that the answer will afford a good defence to the action.

Mr. Phillimore, for the Defendant, in this Country, saying his answer would be ready immediately, was stopped by the Court.

The Lord CHANCELLOR [ELDON].—I had occasion to consider this very lately (1); and declined to grant an Injunction, where the Defendants were abroad, until appearance or default of appearance. This Defendant must have the costs.

SEE note 1 to *Anderson v. Darcy*, 18 V. 447.

[* 472]

RICHARDS v. JACKSON.

[1812, FEB. 7.]

DEMURRER to so much of a Bill as called for a discovery of cases, laid before Counsel, and the opinions, overruled, as covering facts material to the Plaintiff's case (a).

Counsel or Attorney cannot be called upon to reveal the advice given to the Client (b). Demurrer therefore overruled as to the case; and allowed as to the opinion, [p. 474.]

THE Bill stated that by Articles of Partnership, dated the 1st of January, 1786, the Plaintiff was admitted into partnership with William Massey in his profession of attorney and solicitor; which

(1) *Ante*, *Anderson v. Darcy*, 447; *Lane v. Williams*, vol. vi. 798; *James v. Downes*, *post*, 522.

(a) Whether a party can be compelled to produce a case, which he has laid before counsel, with the opinion given thereon, seems to be doubtful. See *ante*, note (b) *Wright v. Mayer*, 6 V. 280; 1 Greenl. Ev. § 240.

(b) See *ante*, note (a) *Wright v. Mayer*, 6 V. 280.

partnership was dissolved in 1794; that Massey mixed his own money and private accounts with those of the partnership; received money on the partnership account, which he did not place in the chest, where the partnership money was kept, nor pay to the partnership banker; and frequently took out money, without entering it; by which conduct there are many apparent errors in the books of the partnership; that on the dissolution of the partnership, on the 1st of July, 1794, an account was stated, settled, and signed, and the Plaintiff delivered up the accounts and vouchers, and received the balance; and in July 1797 all accounts were finally settled. Massey died on the 28th of May, 1803; and his executors filed a Bill for an account against the Plaintiff; alleging, that no accounts were settled; or, if any, they were erroneous.

The Bill farther stated, that about the time of the dissolution the accounts were examined by or on behalf of, Massey; an account of the apparent errors was made out; and a proposal by him for an arbitration was agreed to: but he declined to proceed upon it; and never afterwards objected to the accounts; and he caused some case or cases to be laid before some Counsel for his or their opinion as to his proceeding against the Plaintiff, touching the said accounts; in which he stated the several mistakes, which had taken place between him and Plaintiff, the dealings and transactions between them, the manner, in * which the partnership business had [* 473] been conducted, and the pretended errors in said accounts, or many of such matters; and Massey was advised, that he could not impeach said settled accounts; and therefore never attempted to do so: but by his death, the Plaintiff being unable to obtain from him a full discovery of the said pretended errors, his executors have filed such Bill against the Plaintiff as aforesaid, and have replied to his answers and proceedings, &c.; charging, that there are in their possession the books and accounts of the partnership, letters, papers, &c. relating to the dealings between Massey and the Plaintiff, particularly to the examination of the accounts about June or July 1794, and the supposed errors then pointed out, and lists or accounts of such errors then made out, or drafts or copies thereof; and the case or cases then laid before Counsel in respect thereof, and opinions thereon, or drafts, &c.; and the Plaintiff cannot safely proceed without a discovery.

The Bill prayed a discovery.

The Defendants demurred to so much of the Bill as seeks to discover, whether there are not in their possession, &c. the case or cases in the Bill mentioned, and the opinions thereon, or drafts or copies thereof, &c.

The Lord CHANCELLOR [ELDON] (1).—I am satisfied, that in my own experience I have had cases of this kind laid before me for consideration; and the result was, that the Defendant was advised to submit to answer. I have not, however, succeeded in my search

(1) The judgment *Ex relatione*.

for such a case. This question therefore must now be decided upon those authorities, which appear upon the Records of the Court.

[* 474] *The most material authority is the case of *Radcliffe v. Davey* (1), before the House of Lords in the year 1730 ; who affirmed the judgment of Lord Chancellor King, over-ruling a demurrer as to the discovery of a case for the opinion of Counsel, allowing it as to the opinion ; as a Counsel or Attorney cannot be called upon to reveal the advice given to the client. Lord Hardwicke, who had been Counsel in that case, refers to it with approbation in *Sir William Stanhope v. Roberts* (2), upon a Bill to set aside an annuity against the executor, who was also the Counsel, who drew the instrument : and admitted, that he had the draft. If that case in the House of Lords turned upon the peculiarity, that the Defendant was trustee of the bonds, a similar speciality is not wanting in the present case. There is so much objection to breaking in upon the confidence between Counsel or Solicitor and Client, that, if it were *Res integra*, I should be inclined not to indulge such an inquiry : but I am bound by authority to over-rule this demurrer ; which covers too much ; the Bill having sufficient allegation of facts, contained in these cases and opinions, material to the Plaintiff's case, to the discovery of which he is entitled. —

It appears to have been treated as a settled point, that a defendant is not protected from answering as to his own admissions of facts, although they were contained in a case stated by him for the opinion of counsel : *Glegg v. Legh*, 4 Mad. 206 : but, whether the defendant must also produce the opinion given upon his case, is admitted to be another question : *Attorney General v. Berkeley*, 2 Jac. & Walk. 293. And it should be recollected, that Sir John Leach, V. C., in *Walker v. Wildman*, 6 Mad. 48, said, that the case in the House of Lords, where the client was ordered to produce a case stated for the opinion of counsel, had been followed in *specie*, but not in principle. The Vice Chancellor, in *Walker v. Wildman*, refused to order the defendant to produce letters and papers referred to in the schedule to her answer, she having stated in her answer, that the letters, so referred to, had passed in confidence, and in the usual course of business between a solicitor and client ; for a mere reference to documents by a defendant's answer does not necessarily make those documents part of the answer : see the note to *Hylton v. Morgan*, 6 V. 293 ; and, generally speaking, it is only when documents are so referred to by the answer as to be incorporated therewith, that their production, on the ground of such reference, can be enforced : see, *ante*, the note to *Darwin v. Clarke*, 8 V. 158. It is quite clear, that a professional adviser ought not to produce documents, or disclose communications, which have been entrusted to him solely in consequence of his confidential situation : the privilege of refusing to give such production or disclosure is the privilege, not of the professional man, but of his client and of the public, which ought to be guarded against all such breaches of confidence : see the concluding passage of the note to *Wright v. Mayer*, 6 V. 280.

(1) 3 Bro. P. C. 538 ; Edition by Tomlins, vol. ii. 514.

(2) 2 Atk. 214.

PAINE v. HALL.

[1812, FEB. 25.]

BILL by heir, suggesting a secret, void trust for charity in residuary devisees, but without evidence of a trust expressed, or of an engagement, expressed or tacit, preventing it, dismissed with costs; unless the heir would take an issue; to which he is entitled.

The circumstance, that one residuary devisee was the attorney, who drew the Will, not decisive evidence of fraud.

THE Bill was filed by an heir at law against residuary devisees, suggesting a secret, void trust for charitable purposes. One of the Defendants was the attorney, who drew the Will: but there was no evidence of any fraud, or of the alleged trust.

Sir *Samuel Romilly* and Mr. *Owen*, for the Plaintiff, insisted upon the legal right of the Plaintiff to an action or an issue.

Mr. *Richards* and Mr. *Bell*, for the Defendants.

THE LORD CHANCELLOR [ELDON].—The fact that the person, who prepared the Will, is himself residuary devisee, I have always considered an unfortunate circumstance, calling for a considerable degree of jealousy in the Court: but I do not by any means go the length, that some judges went, particularly Mr. Justice Buller in a case from Hampshire; who considered that circumstance as almost decisive evidence of fraud. That is not my opinion. I know cases, in which it is perfectly impossible fairly to impute fraud, as arising out of such a circumstance (1).

As to the other part of the case, there is no evidence of a trust expressed, nor of such an engagement by words, or by silence, as would authorise the Court to say, the devisees undertook to do that, which prevented the devisor from imposing it upon them, as a trust. This therefore does not come up to the case of Mr. *Hawkins Brown* (2). The Bill must be dismissed with costs: [* 476] unless the heir will take an issue, *Devisavit, vel non*. To that he is entitled.

1. As to the *prima facie* grounds for suspicion which arise whenever an instrument has been prepared by, or under the direction of, a party who is to take a gratuitous benefit there-under, see, *ante*, note 2 to *Harris v. Tremenheere*, 15 V. 34.

2. An undertaking, whether given expressly, or by implication only, by an heir, devisee, or personal representative, to carry into execution the understood wishes of a testator, who, relying on that engagement, has not formerly inserted those provisions in his will, is sufficient to raise a trust: see the note to *Barrow v. Greenough*, 3 V. 152. The mere allegation, however, by an heir, of an honorary trust for purposes prohibited by the Statute of Mortmain without some corroborating circumstances in support of that allegation, might, perhaps, be met by some more summary mode of defence than an answer; but, at all events, the bill, if answered, must be dismissed at the hearing, with costs, unless the alleged trust is proved, or unless the heir asks an issue *devisavit vel non*, to which every heir is entitled, and until the determination of which issue the bill will be retained, and the question of costs reserved: see note 5 to *Muckleston v. Brown*, 6 V. 52.

(1) 1 Turn. 91, 2.

(2) *Muckleston v. Brown*, *ante*, vol. vi. 52.

PARSONS v. BAKER.

[ROLLS.—1812, MARCH 2, 3.]

DEVISE to a nephew in fee, "not doubting, in case he should have no child, but that he will dispose and give my said real estate to the female descendants of my sister in such part or parts and manner as he shall think fit, in preference to any descendant on his own female line." A trust in the event described for the sister's children (a).

RICHARD COPE HOPTON by his Will, dated the 17th of December, 1785, devised his estate at Clifford in the county of Hereford, and all his real estate whatsoever and wheresoever, to the use of his wife for life; with remainder to his brothers and their first and other sons, respectively, in tail male, and the ultimate remainder to his nephew Richard Cope Hopton, his heirs and assigns for ever. Then followed these words:

"Not doubting in case he should have no child or children of his own body but that he will dispose and give my said real estate to the female descendants of my sister Deborah Parsons of Kemerton, widow, in such part or parts and in such manner as he shall think fit in preference to any descendant on his own female line."

The testator died on the 17th of November, 1786. Richard Cope Hopton, his nephew, in 1808 by the deaths of his uncles and the failure of their issue became entitled to the fee simple under the devise. By his Will, dated the 12th of June, 1805, he devised all his estates upon various trusts; and died in 1810; leaving no issue.

[* 477] *The Bill, filed by Judith Parsons and Elizabeth Wells, who with the Defendant Frances Biddle are the only children of Deborah Parsons, prayed, that the Will of Richard Cope Hopton the elder, may be established, &c.; and that the Defendants, the devisees in trust, or the heir at law, of Richard Cope Hopton the younger, may be declared trustees for the Plaintiffs and the Defendant Frances Biddle.

Sir Samuel Romilly and Mr. Wingfield, for the Plaintiffs, and Mr. Hart and Mr. Wray, for the Defendants Biddle and his wife, contended, that the words "not doubting," &c. were a sufficient declaration of the intention to create a trust; the subject and the objects being certain; referring to *Wynne v. Hawkins* (1). *Pierson v. Garnet* (2), and *Brown v. Higgs* (3).

(a) See as to the effect of words of recommendation, *ante*, note (b) *Bull v. Vardy*, 1 V. 270; *Pierson v. Garnet*, 2 Bro. C. C. (Am. ed. 1844,) 231, note (c); *Wynne v. Hawkins*, 1 ib. 179, and notes; *Harland v. Trigg*, ib. 144, note (a), and cases cited; *Ford v. Fowler*, 3 Beavan, 146; *Stubbs v. Sargon*, 2 Keen, 255; *S. C.* 3 My. & Craig, 507; *Pope v. Pope*, 10 Sim. 1; *Brunson v. Hunter*, 2 Hill, Ch. 490; *Ram on Wills*, ch. 15, § 24, p. 231-240; *Bull v. Bull*, 8 Conn. 47; 2 Story, Eq. Jur. § 1068, 1068a, *et seq.* and notes.

(1) 1 Bro. C. C. 179.

(2) 2 Bro. C. C. 38, 226; Pre. Ch. 210.

(3) *Ante*, vol. iv. 708; v. 495; viii. 561. Affirmed in the House of Lords, 1813. See the note, i. 272, *Bull v. Vardy*.

Mr. *Richards*, Mr. *Wetherell*, and Mr. *Buller*, for the other Defendants, the devisees of Hopton, the nephew, and the heir at law, observing that it was not known, whether Hopton, the nephew, ever had a child, insisted, that the disposition has not that certainty, which the law requires to raise a trust in these cases; not ascertaining, who were to be excluded: to whom the descendant of Mrs. Parsons were to be preferred.

The MASTER OF THE ROLLS [SIR WILLIAM GRANT].—The single difficulty in this case arises from the words at the end of the clause in question: “in preference to any descendant on his own female line.”

* Exclusively of those words a trust would be well raised [* 478] for the female descendants of Deborah Parsons; for the property is certain; and the objects would in that case be certain: and the words are sufficient to raise a trust. The question then is, whether these latter words raise an uncertainty as to the objects. I cannot ascribe to them any very definite sense; as, if the female descendants of Deborah Parsons were to take, to be sure they must take in preference to all the world; and consequently in preference to these particular persons. It was idle therefore to say, they should take in preference to “any descendant on his own female line.”

But the question is, whether these words, though perfectly superfluous, have the effect of throwing any uncertainty upon the subject of the antecedent bequest. Do they make it doubtful whether the female descendants of Deborah Parsons were, or were not, the persons really intended to take? The supposition must be, that the testator did not care, who took it, provided the descendants of his nephew in the female line did not take; that his object was, not to give to one class of persons, but to exclude another. Could that be his meaning? Could he intend to say to the devisee, “you must give to the female descendants of my sister Deborah Parsons even in preference to another branch of your own family: but you need not give to them in preference to any other persons: if you will select strangers, you may give to them: but you shall not give to another branch of the same family to the disappointment of these descendants?”

If that is not the effect of these words, what other effect, creating uncertainty as to the object, can be ascribed to them? He had before declared, that these descendants were to take. Then can the subsequent * declaration, that they are to take in [* 479] preference to certain persons, undo, or detract from, the effect of the former declaration? The latter may be nugatory: but is it contradictory to, or inconsistent with, the former? Try it in this way. Strike out all these words, relating to trust; and suppose it a direct devise; as in contemplation of law it is; the trustee having died without making any disposition; and read it thus: “In case he should have no child or children, I dispose and give my said real estate to the female descendants of my sister Deborah Parsons in such parts and manner as he shall think fit in preference to any

descendant on his own female line," would there be any claim for any persons but the female descendants of Deborah Parsons? I conceive there would not. I am not able to ascribe any fixed sense to the concluding words: but certainly cannot ascribe a sense detracting from the former disposition to the female descendants of Deborah Parsons. Then, the trustee being dead without making any disposition, it is just the same as if the testator had by direct devise given to the persons, in whose favor he directs the devisee to make the disposition.

The Plaintiffs are therefore entitled to a Decree.

SEE *ante*, note 2 to *Bull v. Vardy*, 1 V. 270; note 4 to *Moggridge v. Thackwell*, 1 V. 464; and note 2 to *Pigott v. Bullock*, 1 V. 479; as to the general rule, that words of confidence and recommendation in a will have the force of an imperative direction, raising a trust: though that general rule admits some qualifications. That an express disposition, in one part of a will, must not receive an exposition from a subsequent passage, affording only a conjectural inference, see note 4 to *Blake v. Bunbury*, 1 V. 194.

[* 480]

CHEESEWRIGHT, *Ex parte* (1).

[1812, MARCH 4, 5.]

PETITION to have a Commission of Bankruptcy, of a date previous to the Act of Bankruptcy, resealed, refused.
Commission of Bankruptcy resealed to correct a mistake in a name, if not opened.

THIS Petition prayed, that a Commission of Bankruptcy, which issued on the 1st of February, may be resealed, not having been opened. The only ground upon the affidavit was, that the petitioning creditor was not able to prove the act of bankruptcy, previous to that date, upon which he struck the docket; but is now prepared to prove a subsequent act.

Mr. *Heald*, in support of the petition, admitting that such an application had been refused in *Ex parte Thwaites* (2), upon the ground, that the Commission had been acted upon, said that did not exist in this instance; that the creditor was disappointed in his expectation of proving the act of bankruptcy, on which he relied, by quitting the house: an act that may be accounted for, so as to make proceeding upon it very hazardous; and no application had been made by any other person for a Commission.

The Lord CHANCELLOR [ELDON].—Does not something depend upon the reason of the application? Where a Commission has been taken out by a person prepared with the evidence necessary to support it, but a mistake is afterwards found out, for instance, the omission of a letter in the name, it has been done: but does this

(1) 1 Rose, 228.

(2) *Ante*, vol. xiii. 325; *Ex parte Thompson*, ix. 207, and the note, 208.

fall exactly under the same consideration ; a person venturing to take out a Commission, who is not able to prove an act of bankruptcy ? What right have I to prevent an action ; which would be the effect of resealing * the Commission, as the [* 481] party would be stopped from proving the prior date ? This may have been ordered upon an express undertaking by the petitioning creditor to admit the prior date, if an action should be brought : but from the extreme facility, with which persons swear, without any knowledge, that an act of bankruptcy has been committed, it is not to be encouraged.

The Petition was dismissed. _____

1. This case is likewise reported in 1 Rose, 228.

2. With respect to the propriety of suffering merely clerical errors in a commission of bankruptcy to be corrected before it has been opened, at all events, see the note to *Ex parte Thompson*, 9 V. 207.

FULLAGAR v. CLARK.

[1812, MARCH 6.]

ISSUE, whether an instrument was obtained by fraud, &c. not directed on Motion after Answer ; as, where the Decree depends upon a simple fact, viz. legitimacy or competence, according to the present practice to refer a title on Motion. Distinction between legal and equitable jurisdiction upon fraud ; which at law must be proved, not presumed ; and the equitable jurisdiction may be exercised upon an instrument unduly obtained, where a Court of Law could not enter into the question (a), [p. 483.]

Extension of legal jurisdiction to subjects formerly not dealt with at law, marriage brokerage, for instance (b), [p. 483.]

THE object of the Bill in this cause was to have an agreement and lease delivered up, as unduly obtained ; praying, for that purpose, that an issue may be directed ; charging imposition by a woman, whom the Plaintiff had procured to attend his wife in her illness ; and who after her decease acquired great influence over him, being at an advanced age, and very weak in his intellects. The answer denied the charges of undue influence, &c.

(a) Courts of Equity do not restrict themselves by the same rigid rules, as Courts of Law, in the investigation of fraud, and in the evidence required to establish it. 1 Story, Eq. Jur. § 190 ; 1 Madd. Ch. Pr. 208 ; 1 Fonbl. Eq. b. 1, ch. 11, § 8.

(b) Mr. Chief Justice Parsons said : " We do not recollect a contract, which is relieved against in Chancery, as originally against public policy, which has been sanctioned in Courts of Law, as legally obligatory on the parties. For although it has been said in Chancery, that marriage brokerage bonds are good at law, but void in Equity ; yet no case has been found at law, in which those bonds have been holden good." *Boynston v. Hubbard*, 7 Mass. 112. But see 1 Story, Eq. Jur. § 260 ; *Grisley v. Louther*, Hob. 10, and a case cited in *Hall v. Potter*, 3 Lev. 411, 412 ; 1 Fonbl. Eq. b. 1, ch. 4, § 10, note (r).

A motion was made by the Plaintiff, that an issue may be directed, whether the Plaintiff was of competent mind at the respective periods of the execution of the agreement and lease in question in this cause; and whether the said agreement and lease were fairly, or unduly, obtained and executed, with liberty for the jury to indorse any special circumstances; and that the Defendant may be restrained from taking out execution in the action of ejectment he has brought until after the trial of the issue.

[* 482] * Sir *Samuel Romilly* and Mr. *Bell*, in support of the

Motion, admitting, that an application for an issue before the hearing was quite new, urged, that such a practice would be no less beneficial in cases of this nature than it had proved in the instance of a reference of title on Motion (1).

Mr. *Hart* and Mr. *Heald*, for the Defendant, contended, that an issue in this stage of the cause is contrary to the practice, and superfluous, as the Plaintiff, defending himself against the action at law upon his legal demise, will have all the benefit an issue could give him.

The Lord CHANCELLOR [ELDON].—I cannot grant this Motion without consent. The object of the bill is to have the lease, made by the Plaintiff to the Defendant, delivered up, either as having been made by a person incompetent to make a lease, or as having been unduly obtained; and if this motion upon the answer was merely for an issue to try, whether the Plaintiff was of competent mind to execute a deed, and nothing more, and that could not be tried in the ejectment, I will not say, that I would not direct that issue, according to the course that is now followed in the cases, which have been alluded to. I remember the first instance of references of title upon a motion by Sir James Mansfield and me, without, as I have formerly noticed, any expectation of succeeding. We did, however, succeed; and the practice, as then established, has ever since appeared to me very beneficial (1). I have discovered

no sort of mischief and much good in it, as saving expense and time. [* 483] * I have myself in one or two instances

ventured to interpose in a very early stage of the cause, where a simple fact, legitimacy for instance is to decide every thing; and in such a case this course without putting the parties to the expense of going to replication and the examination of witnesses I am convinced was not wrong: but it is very delicate in this early stage to direct an issue to try, whether an instrument has been fraudulently or unduly obtained: which is different from a mere question of competence; bringing into hazard part of the very vitals and essence of the jurisdiction: my opinion being, that this Court will, as it ought, in many cases, order an instrument to be delivered up, as unduly obtained, that a Jury would not be justified in impeaching by the rules of Law, which require fraud to be proved, and are not

(1) *Ante*, *Moss v. Matthews*, vol. iii. 279; *Eldridge v. Porter*, xiv. 139; *Blythe v. Elmhirst*, ——— *v. Skelton*, 1 Ves. & Bea. 1, 516; *Gibson v. Clarke*, 2 Ves. & Bea. 173. See the note, *ante*, vol. iii. 281.

satisfied, though it may be strongly presumed; as Lord Hardwicke said in the case of *Lord Chesterfield v. Janssen* (1); and Lord Kenyon has intimated in other cases. This jurisdiction may be exercised upon such a point, where a Court of Law could not enter into the question, as a Court of Equity is bound to do.

It may be said, that the Plaintiff waives the better relief a Court of Equity would give him; and there are many subjects, marriage-brochage for instance, with which Courts of Law formerly never dealt, as they now do. If, however, the Plaintiff waives the better relief, which a Court of Equity would give him, and is willing to have discussed, whether the instrument was duly obtained at Law, the Defendant has a right to object to an issue, until it is shown upon the record, that the Court ought to grant it; that, if there is not a sufficient ground for having the instrument delivered up in the first instance, there is enough to show, that it ought to go to a trial.

It is therefore a great deal too * much to direct an issue [* 484] in this early stage of the cause, which would either endanger the jurisdiction, or do injustice to the Defendant; and I stopped the motion with the view of standing upon the principles of the Court.

1. As to the practice of directing a reference to the master, when, upon a bill brought for specific performance, the only question is, whether the plaintiff can make a good title, see, *ante*, notes 6, 7, to *Cooper v. Denne*, 1 V. 565.

2. Courts of equity will, certainly, be quite as little disposed as courts of law, to "impute" or "presume" fraud, upon arbitrary grounds, or even upon circumstances of a nature, *prima facie*, to excite suspicion, but which might, perhaps, have been capable of satisfactory explanation, had a fair opportunity of showing it been allowed to the defendant: *Townsend v. Loufield*, 1 Ves. Sen. 35 S. C.; 3 Atk. 536; *Trenchard v. Wanley*, 2 P. Wms. 166; *Bath and Montagues' case*, 3 Cha. Ca. 85. But it seems to be equally clear, that courts of equity feel themselves at liberty to "infer, judicially, a fraudulent purpose," from suspicious circumstances, well corroborated and in no way rebutted, though such circumstances fall short of legal proof: *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 155; *Walker v. Symonds*, 9 Swanst. 71; *Taylor v. Jones*, 2 Atk. 602; *Stileman v. Ashdown*, 2 Atk. 480. For the rule of evidence in equity frequently calls upon the judge to decide, taking all the circumstances together, not absolutely on which side the truth lies, but that it is highly and morally probable the truth is with one party or witness, rather than the other: *East India Company v. Donald*, 9 Ves. 282. The rules of evidence are, no doubt, in general, the same in equity as at law; still, where fraud is charged in a bill, the Court of Chancery does not confine itself within such strict rules as they do at law, but will enter into all the circumstances and merits of the case, in order to come at fraud (*Man v. Ward*, 2 Atk. 229); as to which, that court has authority often contrary to and beyond the rules of law: *Garth v. Cotton*, 3 Atk. 755; and, according to Lord Hardwicke, there is no rule of evidence to be laid down in the Court of Chancery but a reasonable one, such as the nature of the thing to be proved will admit of: *Llewellyn v. Mackworth*, 2 Atk. 40. There are also many instances in which even courts of common law will admit, and act upon, presumptions;—not mere positive presumptions of law, which admit of no contradiction, but presumptions rising out of facts and circumstances, which presumptions, if not rebutted, acquire the strength of a species of evidence: *Goodtitle v. The Duke of Chandos*, 2 Burr. 1072: for, with respect to legal presumptions, the distinction must not be overlooked between

those conclusive presumptions against which nothing can be said, and the presumptions which, though inferred by the law, are so inferred from facts which it allows to be rebutted by evidence: *Ellison v. Cookson*, 1 Ves. Jun. 108. The argument that a decree in equity may, both upon principle and the balance of authorities, be rested upon such evidence of *mala fides* as is morally conclusive, though it does not amount to direct and formal proof, is treated more at length in 1 Hovenden on Frauds, 18—26.

3. There seems to be no doubt as to the jurisdiction of a court of equity to order an instrument to be delivered up, which even upon the face of it, appears to be legally invalid; and, *a fortiori*, the exercise of this jurisdiction must be proper when the invalidity of the instrument, or the injustice of enforcing it, depends upon doctrines peculiar to equity, and not recognised at law: see note 1, to *Colman v. Sarrell*, 1 V. 502; and the note to *Newman v. Milner*, 2 V. 483; and, even in cases over which courts of law have, in modern times, assumed a concurrent jurisdiction, professing to act upon a supposed analogy to proceedings in courts of equity, the equitable jurisdiction is by no means to be considered as ousted: see note 2, to *Toulmin v. Price*, 5 V. 235.

PICKERING v. RIGBY.

[1812, MARCH 7.]

MOTION by Defendants to a Bill for a partnership account for a production of the accounts before Answer refused.

In a suit by the executor of a deceased partner against the survivor for an account, the Defendant moved, before answer, for a production and inspection of the partnership accounts.

Sir *Samuel Romilly*, in support of the Motion said, it was reasonable, though perhaps new: there were instances of refusing such a Motion for the production of deeds, but none as to partnership accounts. But upon a statement by answer that the Defendant cannot make the discovery completely without seeing the books, &c. which he believes are in the Plaintiff's hands, proceedings would be stayed without a cross bill.

Mr. *Hall*, for the Plaintiff, resisted the Motion, as contrary to practice; contending, that the Defendants ought to file a cross bill: these books and accounts may not be in the Plaintiff's possession; and the Bill has no such statement.

The Lord CHANCELLOR [ELDON].—I do not recollect a single instance of such a motion granted: but the object may be obtained in another way. Where the executors of a deceased partner, filing the Bill for an account, have got all the partnership books and accounts, as the Defendant verily believes, (for he cannot [* 485] carry it * farther, and to that for this purpose it must be carried,) the Defendant by his answer swearing, that he cannot put in a better answer, as he has not the partnership books and accounts, that, it is true, ought to be sufficient; but, as it tends to the delay of justice, and to perplexity, and as a cross bill must be for an account, as well as discovery, I think I remember this kind

of Motion by the Defendant, stating by his answer, that the Bill calls for a discovery, which he cannot make completely without seeing the partnership books and accounts, and he verily believes, those books and accounts, to the joint possession of which both were entitled, are in the hands of the Plaintiff, that the Court would stay proceedings against him for not putting in his answer, until he has been assisted with that inspection (1). That sort of Motion will do without a cross bill : but this Motion must be refused (2).

SEE the note to *Wiley v. Pistor*, 7 V. 411.

EARNSHAW v. THORNHILL.

[1811, MARCH 5, 7.]

THE subsequent Order, extending an Injunction against proceeding at Law to stay Trial, not discharged separately : but the Injunction, as extended, must be dissolved generally upon the Answer by the usual Order nisi, subject to showing Exceptions for Cause, or the undertaking to show cause on the merits. Distinctions in practice between Injunctions to stay Waste, or the sale of an estate, and against an Action, [p. 488.]

Injunction before Action commenced prevents the commencement ; after Action stays Execution only in Chancery, differing from the Exchequer, without a distinct application to stay Trial (a), [p. 488.]

Injunction extended to stay Trial on affidavit, that Plaintiff cannot safely go to Trial without the Answer, and believes it will produce discovery material to his defence, [p. 488.]

An Injunction against proceeding at Law was by a subsequent Order extended to stay Trial. The answer was filed on the 3d of March ; and on the same day notice was given for the 5th of a Motion to discharge the second Order, extending the Injunction to stay trial : the Commission-day at York, where the trial was to take place, being the 7th of March.

Mr. *Richards* and Mr. *Benyon*, in support of the Motion.—The Plaintiff, having obtained the discovery from the answer, which was put in as soon as it could be, can sustain no injury by permitting the cause to go to trial. The objection is merely technical ; that, though the Injunction, as extended, was obtained by two Orders, the one is * merged in the other, and the Defendant cannot get rid of the latter branch of the Injunction without discharging the whole. The latter is a distinct, substantive Order, analogous to the Order in the case of waste upon the answer coming in ; and is obtained upon affidavit, that the Plaintiff can-

(1) *Micklethwaite v. Moore*, 3 Mer. 292.

(2) *Ante*, *Wiley v. Pistor*, vol. vii. 411 ; *Atkins v. Wright*, xiv. 211 ; *The Princess of Wales v. The Earl of Liverpool*, 1 Swanst. 114, 580 ; 1 Wils. Ch. Rep 113 ; 2 Wils. Ch. Rep. 29 ; *Wynne v. Griffith*, 1 Sim. & Stu. 147.

(a) 1 Smith, Ch. Pr. 610, 611 ; 2 Madd. Ch. Pr. 220.

not safely go to trial without the answer. If the second Order can be kept distinct, and the rule of practice is not imperative, Reason and Justice require, that the Plaintiff, having obtained the discovery, shall not refuse to go to trial.

Sir *Samuel Romilly* and Mr. *Roupell*, for the Plaintiff.—What sensible distinction can there be between the Injunction staying execution and staying trial? In the former case the Court requires a full discovery, before it will decide, that the proceeding shall not be farther stayed: in the latter a full answer is equally necessary; and there is no distinction as to the rules for ascertaining whether the answer is or is not complete. Those rules, securing a full discovery, are just as applicable to the one case as to the other; and are universal in their application, whether the pleadings are long or short; giving the Plaintiff a week to take an office copy, and see, whether the answer is sufficient; when he must determine upon taking exceptions; and then he may obtain another week to instruct his Counsel upon the merits. This answer was filed on the 3d of March: on the same day the notice of Motion was given: it came on upon the 5th; and this (the 7th) is the Commission-day at York. Thus no opportunity is allowed for ascertaining, whether the answer is full. Is the settled course to be altered, and a new rule of practice established, in such a case? The common Injunction was obtained upon an attachment; and the Defendant has not cleared his contempt: but independent of that, he has no right [* 487] to have the Order, restraining *trial, discharged. The Injunction is entire, and there is neither principle nor authority for discharging a part of it.

Mr. *Richards*, in Reply.—In this case, as in the case of waste, the Defendant is entitled to move upon the answer to dissolve the injunction; and the Court will give the opportunity of looking into the answer, to ascertain, whether the discovery is, as it must be, full. The application is to discharge this Order, not as being part of the Injunction, but as a distinct, substantive Order, by which the Injunction has been enlarged for the purpose of obtaining discovery. There is a great distinction between Injunctions staying execution and staying trial. The ground for extending the Injunction being, that the Defendant has not answered, and given the discovery, when that is obtained, the Plaintiff is precisely in the same situation as if he had no occasion to apply for that Injunction. Any surprise may be remedied by an application to the Judge at law, as in the instance of the sudden absence of a witness, &c.

The Lord CHANCELLOR [ELDON].—Among the numerous cases, that have occurred, of Injunction extended to stay trial, I do not recollect either in the books or in practice a single instance of an application to dissolve an Injunction, so far as it restrains the trial, separating that from an application to dissolve it generally. That fact, though it is not conclusive as to what ought to be done is a species of strong negative proof, that such is not conceived to be the practice; as it is obvious, that in many instances relief from the

Injunction, so far as it stayed trial, even without getting rid of it, as it stayed execution, must have been an object not only of convenience, but of pressing necessity.

*The case of waste has little, or no, analogy to this. [*488] In that case, or in the instance, that occurred yesterday, of an Injunction against the sale of an estate, the Plaintiff obtains his Injunction until answer or farther order; and the Defendant may come for a farther order, saying merely, that the affidavit, on which the Injunction was obtained, was not sufficient; or putting in a defective answer, may insist, that it contains enough to show, that the Injunction ought not to have been granted, and from the nature of the Bill, connected with the affidavits, that, though properly granted, it ought not to be continued: but this Injunction against an action stands upon a different principle. First, if the application is previous to the commencement of an action, the Injunction stays any proceeding, even the commencement of an action; and yet, though it is true, that the commencement of the action may be clear justice, when the answer comes in, that is probably full, I never recollect an application to permit the commencement of an action except by the Order *Nisi*, at the hazard of showing exceptions for cause, (which is a considerable hazard; as, if the exceptions are over-ruled, the Injunction is dissolved of course), or undertaking to show cause upon the merits; and it may be just as inconvenient not to be permitted to commence an action as to be restrained from proceeding in it.

When an action has been commenced, the Order in this Court (1), differing from the Court of Exchequer, permits it to go on to a plea and judgment; but if afterwards the Plaintiff comes, stating by affidavit, that he is advised, that he cannot safely go to trial without the answer, and that he verily believes, that if an answer is put in, it will produce a discovery material to aid his defence at the * trial, the Court gives credit to that affidavit without looking [*489] into the Bill, to ascertain, whether the affidavit will probably be made good; which would be liable to the objection, of trying it *ex parte*; as the Court cannot know, what additional evidence the Defendant has to give. The Court then, with reference to the farther progress of the cause, puts the Plaintiff at law in precisely the same situation, as if the Bill had been filed before the action commenced.

To keep the practice whole, the Court must, as is admitted, keep the Injunction alive, until a full discovery is made. The Court, for the same reason that it cannot undertake to determine upon the whole Bill, cannot undertake to say, whether particular charges will, or will not, be material to be answered, connected with other circumstances, of which it knows nothing. The Court must see, whether the answer is full: but then the question is, whether that can be examined in any other way with reference to the case, in

(1) *Ante*, *Bullen v. Ovey*, vol. xvi. 141, and the references in the note, x. 452.

which this Injunction was granted, than in any other case; viz. by requiring the party to keep the Injunction, or loose it, at the hazard of showing exceptions for cause, or showing cause upon the merits.

As to not being at liberty to commence an action, or take execution, until the sufficiency of the answer is proved in the usual manner, and according to ordinary practice, the inconvenience of stopping the Plaintiff at law may in various instances, be just as great as in the present. If the practice is new, it is right to keep it as like the practice in other cases, as may be; and I am strongly confirmed in this by not recollecting a single instance of an attempt to make it different.

The motion was refused without Costs (1).

THE rule of practice not to dissolve an injunction so far only as it restrained a trial at law, without dissolving it *in toto*, is not inflexible; in the time of Lord Hardwicke, the general rule appears to have been deviated from in the case of *The Royal-Exchange Assurance Company v. Baker*, which case, as extracted from the register's book, is inserted in a note to 1 Ves. & Beat. 367; and in the modern case of *Barrett v. Tickell*, Jacob's Rep. 157, an injunction was dissolved so far only as it extended to stay trial, not allowing execution to be taken out without a farther application to the court. In ordinary cases, however, though the order to stay trial is, in the Court of Chancery, a distinct order, yet, as it is only an extension of the previous order for the common injunction; the usual effect of removing the first order, which is the foundation, naturally must be, that the second order, which is only a superstructure, should, at the same time, be removed, and without the necessity of any express separate motion to that effect: *Bishlon v. Birch*, 2 Ves. & Beat. 42. As to the grounds required by the Court of Chancery in support of an application to have the common injunction extended so as to restrain a trial at law, see, *ante*, the note to *Garlick v. Pearson*, 10 V. 450, with the farther references there given.

(1) See *Barrett v. Tickell*, 1 Jac. 154, and the note, 159

ONSLOW v. MICHELL.

[ROLLS.—1812, MARCH 6, 9.]

Portion by settlement, vested at 21, or marriage of daughters, to be paid at the death of the surviving parent; if the parents or either should in their or either of their life-time settle, give, or advance money, lands, &c. in marriage or otherwise, such advancement to be taken as part or the whole of the portion, unless the contrary declared in writing. A legacy payable at 21 a satisfaction *pro tanto*.

Rule as to satisfaction of a portion by a legacy, that there must be some express evidence, or at least a strong presumption, that it was intended as such. Slight variation in the time of payment between twenty-one and twenty-one or marriage immaterial (a), [p. 493.].

Share of personal property under father's intestacy not considered an advancement by him in his life, [p. 494.]

Provision by Will considered as an advancement in the life-time (b), [p. 494.]

By indentures dated the 25th of February, 1748, previous to the marriage of Matthew Michell and Frances Ashfordby, the manor and estates of Chitterne and other estates in the county of Wilts were under a power given by settlement, dated the 2d of February, 1734, charged with and made subject by Matthew Michell to the raising and payment of the sum of 3000*l.*, as and for the portion and portions of all and every the child and children of the marriage, other than the eldest or only son, to be applied and disposed of in such manner as after mentioned: that is to say, in case there should be but one such child, the whole 3000*l.* to go to such only child; and in case there should be two or more such children, then the said 3000*l.* to be equally divided between or amongst them: the said portion or portions to belong to and be an interest vested in such of the said children as should be a daughter or daughters at her and their respective ages of twenty-one years, or days of marriage; but to be paid to such of the said daughters as should attain twenty-one, or be married during the joint lives of Matthew Michell and Frances Ashfordby, or in the life of either of them, at the end of three months after the decease of the survivor, with interest at 4 per cent.; and it was declared, that if the said parents, or either of them, should in their or either of their lifetime settle, give, or advance, unto, for or upon any child or children of the marriage, entitled to portions under the appointment therein before contained, any sum or sums of money, lands, tenements, goods or chattels, for or towards his, her, or their advancement or preferment in marriage or otherwise, then such sum or sums of money, and the value of such lands, tenements, goods or chattels, so to be received by, *or advanced or given to, or settled upon, such child [* 491]

*(a) It appears that there is a difference between portions by settlement, and cases of legacies by will, as to subsequent advancements. See, *ante*, note (a) *Hinchcliffe v. Hinchcliffe*, 3 V. 516: note (1) *Ellison v. Cookson*, 1 V. 110; note (a) *Trimmer v. Bayne*, 7 V. 515.

(b) 2 Story, Eq. Jur. § 1109, and note.

or children respectively, should be accounted, deemed and taken, as part if less, and if as much or more, for the whole of the portion or portions thereby provided for them, as aforesaid, unless the said parents, or the survivor of them should, by writing, signify or declare the contrary.

The settlement contained a covenant by Matthew Michell to lay out 10,000*l.* subject to a trust for securing an annuity of 100*l.* for the separate use of his wife, in the purchase of estates to be settled upon himself and his wife successively for life, with remainder, subject to a trust term of six hundred years, to their first and other sons in tail male, and the reversion to himself and his heirs. The trust of the term was, after the decease of the survivor of the husband and wife, to raise 3000*l.* as an additional portion for the daughters and younger sons, in case there should be issue male, over and above the portion secured and provided for them upon the estate at Chitterne. The sum of 10,000*l.* was paid by Matthew Michell, and laid out upon mortgage.

The issue of the marriage was three children, Matthew, Francis, who died an infant and unmarried, in the life of his father, and Ann. Matthew Michell, the father, died on the 29th of April, 1752, having by his Will bequeathed to his daughter Ann, the sum of 4000*l.*, to be paid to her at the age of twenty-one years; directing the 10,000*l.* on mortgage to be laid out after the death of his wife in lands as near Chitterne as can be; which lands he gave, after the death of his wife, to his son, with all his estate, moneys, and furniture belonging to Chitterne. Ann Michell having attained the age of twenty-one years, married Sir Richard Onslow in [* 492] .1773; and 2000*l.*, *part of the legacy of 4000*l.*, was vested in trustees upon the trusts of the settlement executed on that marriage. On the death of Frances Michell, the widow, in 1810, the Bill was filed against Matthew Michell, the son, by Sir Richard and Lady Onslow, and their children, praying an execution of the trusts of the settlement of 1748, and that the Defendant may be directed to raise the two sums of 3000*l.* &c.

The Answer stated, that Frances Michell, after her husband's death, made some advances to her daughter, and bequeathed to her a legacy of 500*l.*; submitting, that those sums ought to be taken as advancements, and deducted from the portions; and that so much only, ought to be raised as with those sums advanced and the 4000*l.* will make up the sum of 6000*l.* The Bill represented the sums advanced by the mother in her life, as merely trifling presents.

Mr. Richards, Mr. Leach, and Mr. Wetherell, for the Plaintiffs, contended, that this was not a case of double portions; that the advancement was not in the life, but at the death of the parent, by Will; and there was no such clear intention in the father to discharge the land, when purchased, from the 3000*l.*, as would raise a case of election.

Sir Samuel Romilly and Mr. Bell, for the Defendant, insisted, that the legacies of 4000*l.* and 500*l.* were a satisfaction in part of the

6000*l.*; any advance being by the settlement a satisfaction, unless the contrary should be declared; 2dly, that the sum of 10,000*l.* was so disposed of by the Will, giving the legacy of 4000*l.*, as to raise a case of election.

* The MASTER OF THE ROLLS [Sir WILLIAM GRANT].— [* 493] If Lord Alvanley has in the case of *Hinchcliffe v. Hinchcliffe* (1) correctly laid down the rule as to satisfaction of a portion by a legacy, that there must be "some express evidence, or at least a strong presumption, that the testator intended it as such," it is difficult to say, there is in this case any thing in the manner of giving the legacy, that indicates an intention to satisfy the portion, or any part of it, by that legacy. In saying that, however, I do not mean to lay any stress upon the slight variation in the time of payment between the age of twenty-one and the age of twenty-one or marriage. But, if the legacy can be considered as a portion advanced within the meaning of the proviso in the settlement, no evidence of the intention is necessary; as every advancement is, by the terms of the proviso, to be considered as a satisfaction *pro tanto*, unless the contrary is expressly declared.

Upon this latter question there are cases, that bear more closely than either of those, which were cited in the argument. I do not see, how the case in *Ambler* (2) at all applies: the question with regard to Mrs. Watson being, whether the portion, given by the Will, was satisfied by the settlement made upon her marriage; and as to the two unmarried daughters, there was no doubt that the land, devised by the Will, had come or descended to them, which was the case specified in the original settlement. In the case of *Warren v. Warren* (3) Lord Thurlow does seem to have thrown out some opinion upon the * point; though it is very difficult to collect the exact import of it from the obscure manner, in which it is stated in the Report. [* 494]

The cases, to which I alluded, are *Twisden v. Twisden* (4) and *Leake v. Leake* (5). In the former this question is incidentally noticed: in the latter it came directly under consideration. In *Twisden v. Twisden* the question was, whether the daughter's share of her father's personal estate under his intestacy could be considered an advancement by the father in his life; and it was held, that it could not be so considered. How far a provision by the Will of the father would have been differently considered, was a good deal discussed; and the Lord Chancellor seems to have thought it a very doubtful question.

In *Leake v. Leake* the Counsel for the younger children seem to have admitted, that the provision by the Will must be considered as

(1) *Ante*, vol. iii. 516; see 529, and the notes, i. 112, *Ellison v. Cookson*, 259.

(2) *Watson v. Earl Lincoln*, Amb. 325.

(3) 1 Bro. C. C. 305.

(4) *Ante*, vol. ix. 413; see 425; *Golding v. Haverfield*, 13 Pri. 593.

(5) *Ante*, vol. x. 489.

a portion given in the life-time of the father. The Lord Chancellor first examines, whether any other advancement than upon marriage was to go in satisfaction of the portion; and then says (1), "The next consideration is, whether the provision by the Will as to all the real and personal estate is a satisfaction entirely of all the younger children could claim. It is truly said, that a provision by Will is to be considered as an advancement in the life-time of the party. That has been repeatedly decided, and is not to be disturbed."

I confess, I have not been able to find any former case in which that question had been distinctly decided: but the case itself does involve in it such a decision; for the only ground, upon [* 495] which the provisions, made by the Will, * were held not to be advancements within the terms of the proviso, was, that the Will amounted to a declaration, that they should not be so considered. In the absence of such a declaration it seems clear, that the determination would have been the other way.

There is, however, less difficulty in this case than in that. It cannot be argued here, as it might have been there, that according to the strict letter of the settlement the advancement was actually to take effect in the life-time of the parent. Here the word "*settle*" occurs; and it would have been clearly sufficient to settle a sum of money, though the payment should not take place until after the death of the parent. As the portions were not payable until after the death of both parents, why should it be an objection to the sufficiency of the settlement, that the instrument by which it was made could not operate until the death of one of them? Suppose the father had made a settlement by deed, with a power of revocation, and had died without revoking, could it be said, that the child took nothing by settlement from the father? Suppose it even to stand upon the word "*give*;" can a daughter, who under the Will took a large sum long before any part of the portion became due, say, her father has *given* her nothing? If he has given her any thing, the gift was made by his Will, which was an act in his life-time. Upon the authority of the case of *Leake v. Leake*, and what I conceive to be the fair sense of this settlement, the portion must be considered as satisfied *pro tanto* by the legacy of 4000*l*.

My opinion upon the effect of the legacy makes it unnecessary to consider the question of election.

The legacy from the mother is under just the same circumstances.

[* 496] *The Decree accordingly declared the Plaintiffs entitled to have the sum of 1500*l*. only raised out of the settled estates.

With respect to the *prima facie* presumption against a child's claim to a double portion, and the rule, that unless this presumption is rebutted by evidence, a portion satisfied by a bequest of equal or greater amount; as, also, that in such cases

(1) *Ante*, vol. x. 477.

slight circumstances of difference as to the time of payment of the provision are not regarded: see, *ante*, the notes to *Ellison v. Cookson*, 1 V. 100; note 6 to *Blake v. Bunbury*, 1 V. 194; note 2 to *Sparkes v. Cator*, 3 V. 530; note 2 to *Barclay v. Wainwright*, 3 V. 62. It is too late now to examine the principle of the proposition, that a provision by will is to be considered as an advancement in the lifetime of the testator; that doctrine has been too repeatedly acted upon to be now shaken; *Goolding v. Harverfield*, M'Clel. 357; and see the note to *Smith v. Smith*, 5 V. 721.

SHAW v. LINDSAY.

[1812, MARCH 10.]

ATTACHMENT on service of Subpoena in Scotland. (See note (3).)

A MOTION was made for an Attachment with proclamations on service of the Subpoena in Scotland.

Mr. *Cooke*, in support of the Motion, cited *Scott v. Hough* (1), and *Burke v. Lord M'Donald* (2).

The Lord CHANCELLOR gave the Order; observing, that, if Lord Thurlow was right in granting an Attachment after service of Subpoena in Scotland, all the rest of the process must follow (3).

SEE, *ante*, the notes to S. C., 15 V. 380.

(1) 4 Bro. C. C. 213.

(2) 2 Dick. 587. See the reference, 2 Ves. & Bea. 2d edit. 408, to *Stevenson v. Anderson*.

(3) It appears by the Register's Book, that the Order was finally refused; the cases cited proving to be misreported; see Mr. Belt's note, 4 Bro. C. O. 213, 5th edition.

THE ATTORNEY GENERAL v. BROOKE.

[1812, FEB. 12.—ANTE, 319.]

AFTER the Order permitting the Defendant to re-hear the Decree made on his default, setting aside the charity lease, and directing an account of the rents, he was ordered to give security for the sum reported due.

AFTER the Order (1), admitting the Defendant to re-hear the Decree, obtained upon his default, setting aside the lease of the Charity Estate, and directing an account against the Defendant, according to a valuation to be set by way of annual rent from the time of his purchase in 1794, a Motion was made, that he should pay into Court the sum found by the Master's Report to be due.

[* 497] * Sir Samuel Romilly and Mr. Bell, for the Relators, in support of the Motion.—No objection can be made to secure the sum reported due from the Defendant, until the cause can be re-heard, according to the Order he has obtained. The reason he assigns for not having appeared, a very precarious state of health, is the strongest ground for securing the money. The default in this instance makes it stronger than the common case of a Decree; which is not stopped by an Appeal (2).

Mr. Leach and Mr. Edwards, for the Defendant.—This application must depend upon the merits; which the Court will consider. As there is no probability, that the Defendant can be fixed with this charge, there is no ground for the Motion. The facts are, that in 1787 a new lease was granted to the widow of a former tenant, with a covenant for renewal, upon a fine of 15*l.*, and a surrender of the former lease. The new lease having been assigned to a person, who became bankrupt, was bought for 200*l.* by a person, who did not complete his purchase; in whose place the Defendant came on payment of that sum in 1794; and by agreement with the tenant, who did not pay him any rent, took possession. He does not desire more than to have his 200*l.* returned, offering to surrender the lease. The Decree being obtained in the usual course upon default, that he shall account for an annual rent of 60*l.* for sixteen years, the question is, whether he is now to pay that into Court, having never received it from the under-tenant, who was bound to pay it to him, [* 498] and who is before the Court. * In *The Attorney General v. Griffith* (3), the account is given only from the demand previous to the Information. The ground for thus confining the ac-

(1) *Ante*, 319; *Attorney General v. Magwood*, 135; *Attorney General v. Backhouse*, vol. xvii. 283, and the references in the note, vi. 453; *Attorney General v. Wilson*, *post*, 518.

(2) *Ante*, *Way v. Foy*, 452; *Willan v. Willan*, vol. xvi. 216; *Huquenin v. Basely*, xv. 180. See *The Warden and Minor Canons of St. Paul's v. Morris*, ix. 316, and the note.

(3) *Ante*, vol. xiii. 565.

count is, that the lease was good in Law; though void in Equity from the moment, when, being required to surrender, his interest, he has notice, that it is considered injurious to the charity: for which he then becomes a trustee.

Sir *Samuel Romilly*, in reply.—The resistance to this Motion is, in truth, an application by the Defendant to suspend proceedings under the Decree, by having the cause set down for farther directions, and so procuring payment. Obtaining permission to have the Cause re-heard, the Defendant must state a special ground for suspending the Decree; and ought to propose terms; but, desiring to suspend it, he does not propose to bring the money, or any part of it, into Court. The facts alleged, that this lease was bought in 1794 at a public sale, for 60*l.* a year in perpetuity, renewable for ever on payment of a fine of 15*l.*, and that the Defendant has permitted the tenant to pay no rent from that time to this, from strong evidence of knowledge, that the lease could not be maintained. The Defendant must therefore be treated as a trustee for the charity.

The Lord CHANCELLOR [ELDON] made an Order, that the Defendant should give security.

SEE, *ante*, the notes to *S. C.*, 18 V. 319.

DENTON v. DAVIES.

[* 499]

[ROLLS.—1812.]

PURCHASES held not a substitution for estates sold under a power in a settlement to sell, and invest the money in estates to be settled to the same uses, there being no original trust, subsequent agreement, or representation relied on (*a*). Account decreed of the money produced by the sale, not of the present value. Whether a party acting upon the faith of a representation, not to him, or with a view to deceive him, but to a third person, would be entitled to relief against the person making it, *Quære* (*b*), [p. 504.]

By the marriage settlement of the Defendant Thomas Davies, and Judith, his wife, dated the 19th and 20th of March 1779, settling his estates in the counties of Flint and Salop, and her estates in Denbighshire, to the use of themselves for their respective lives, with remainder to their first and other sons in tail male, and their

(*a*) See, *ante*, note (*a*) *Perry v. Phelps*, 4 V. 108; 2 Story, Eq. Jur. § 1210.

(*b*) The Supreme Court of the United States has said that no case is recollected where a Court of Equity has afforded relief for an injury sustained by the fraud of a person, who is no party to a contract induced by that fraud. *Russell v. Clark*, 7 Cranch, 69; 1 Story, Eq. Jur. § 201.

As to the doctrine in the case of *Pasley v. Freeman*, see, *ante*, note (*c*) *Evans v. Bicknell*, 6 V. 174 *a.* The Statute of 6 Geo. IV. ch. 14, commonly called Lord Tenterden's Act, extends the Statute of Frauds, by requiring a memorandum in writing, signed by the party to be charged, of representations of another's character and ability, with a view to give credit to him. The same provision may be found in the Revised Statutes of Massachusetts, cap. 74, § 3.

first and other daughters in tail general, a power was given to Thomas and Judith Davies respectively to sell or exchange any of the settled estates so that the money arising by such sale should be paid to trustees in trust, to be applied in the purchase of lands of inheritance in the counties of Flint, Salop, or Denbigh; and that the lands to be purchased or taken in exchange should be of equal or greater value than those sold or exchanged, and should be immediately settled to the same uses as the lands so to be sold or exchanged.

The issue of the marriage was five daughters; and there was no issue male. Elizabeth, the eldest daughter, having attained the age of twenty-one in 1801, a recovery was suffered to the use of Thomas and Judith Davies successively for life, and to their daughter Elizabeth in fee, subject to the joint appointment. Judith Davies died in 1806.

In 1808 the Plaintiff John Denton, married Elizabeth Davies; and a settlement was executed of their respective estates, subject to their joint appointment, to them respectively for their lives, with remainder to each in fee.

[* 500] *The Bill prayed an account of the rents of the settled estates, received by the Defendant; that the title-deeds of the estates, purchased by the Defendant, may be deposited with the Master; but if it shall appear, that these estates are vested in the Defendant and his heirs, and have not been conveyed to the uses, which ought to have been declared, then that the Defendant may be decreed to convey to such uses: but, if the Court shall be of opinion that those estates, so purchased, are not affected with such Equity, that an account may be taken of what the value of the estate sold would have been, if they had not been sold, or of the actual value of such estates at this time; and that the same may be answered by the Defendant, and laid out to the uses intended to have been declared of such newly-purchased estates by the Defendant, his wife and daughter, and by the marriage settlement of the Plaintiff.

The Bill charged, that the Defendant in 1788, 1790, and 1792, purchased estates in the vale of Clwyd, contiguous to his residence of Plas Draw; and in anticipation of the sale of part of the settled estates, not having any other means, borrowed money for that purpose; that the daughters under his influence joined in the recovery and indentures of 1801; that he paid for the purchased estates 6210*l.*; that they were purchased by him in contemplation and for the purpose of having them settled to the same uses, and of being substituted for the estates sold, and he had declared that intention.

The Defendant by his answer, admitting his general representations, both before and after the recovery, to his wife and daughters, that it would be advantageous to sell, and lay out the money in the purchase of other estates in the neighborhood of Plas Draw, the sales, upon which he had received 6210*l.*, and that his daughter executed the conveyances by his recommendation, stated,

that, having contracted debts by the purchases in the neighborhood of Plas Draw, and by building, &c., he applied the whole of the purchase-money in the discharge of those debts; that he is willing to account for the purchase-money; and it was his intention to invest it either in the purchase of an adequate part of his unsettled estates, or of some other estates contiguous to Plas Draw, and to go along with it; that the purchases were many years anterior to the deed of 1801; and only a very inconsiderable portion of the settled estates was sold until several years after the other estates were purchased; denying any representations or promises to his daughter, that his unsettled estates should be conveyed to the uses of the deed of 1801, or to her in lieu of the estates sold, and that he purchased with any view to a settlement.

The Defendant, in a letter to the Solicitor for some of the purchasers upon the subject, stated, that the purchased estates, which were of greater annual value than the whole of his estates in Flintshire and Shropshire, as well those sold as those he had remaining to sell, were settled in lieu and exoneration of the estates he had sold, or might sell; asking, had it not been for that, whether the trustee in his marriage settlement would have been content with the conveyance made to him, or his eldest daughter have been advised to join in the recovery.

Mr. Hart and Mr. Roupell, for the Plaintiffs. Sir Samuel Romilly, Mr. Leach, and Mr. Lyon, for the Defendants.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The material question in this cause is, whether the Plaintiffs have a right to have the estates purchased by the Defendant substituted * for so much of the settled estates as were sold. The [* 502] Defendant admits, that he has received, and applied to his own use, the money produced by the sale of the settled estates; and that the Plaintiffs are entitled to have it laid out in other estates: but he denies, that the estates purchased are subject to the uses of his marriage settlement, or that there was any agreement by him to convey them to those uses.

As the purchase was made by the Defendant in his own name, the proof, that it is subject to any trust, lies upon the Plaintiffs. It cannot be contended, that the estate was subject to any trust at the time it was purchased. The Defendant positively denies, that he purchased with any view to a settlement, and says, that only a very inconsiderable portion of the settled estates was sold until several years after the other estates were purchased. It seems therefore impossible to say, that these purchased estates were from the beginning liable to the same trusts as the settled property. It seems equally difficult to fasten a trust upon the land on the ground, that these estates were purchased with the produce of the trust estates.

It appears, that the Defendant borrowed money for this purchase; and he applied part of the money, arising from the sale of the settled estates, in paying off part of that debt. That cannot be represented as a purchase made with the trust money: supposing land, pur-

chased with the produce of the trust estate, would have belonged to the trust.

As to a subsequent agreement to substitute the estates purchased for the settled estates, there is no admission of any such [* 503] agreement. The Defendant does, in substance, *admit, that both before and after the recovery suffered he represented to his wife and daughter, that it would be advantageous to sell the estates comprised in that recovery, and to lay out the money in the purchase of other estates. The application, however, of the money was left to him; and he says, his intention was to invest it either in an adequate part of the unsettled estates, or in some other estates contiguous thereto; that he would have been ready to settle an adequate part of the unsettled estates, if required; and might have expressed his readiness in conversation; but does not recollect that he did. He admits, that under his influence, and by his advice, his daughter joined in the sales: but he denies, that the estates purchased were to be substituted. It is impossible to extract from this an agreement to put the purchased estates into settlement.

As to the papers drawn up, pending the treaty of marriage between the Plaintiffs, not being signed by the Defendant, they cannot operate as either declaring a trust, or constituting an agreement. Indeed, none of them purports to be declaratory of trust; and the proposed agreement vested in treaty, and was never brought to a conclusion. The letter to the Solicitor is no acknowledgment of a trust. It is a false assertion, that the estates were actually settled in lieu and exoneration of the estates sold; and that representation was made to a third person, and not to the Plaintiffs. The deed of August, 1808, in which the Defendant declares, that he had settled, or was about to settle, is also a transaction with a third person.

If those representations had been made to the Plaintiffs, and they had married upon the faith of them, the Court would, I apprehend, have compelled the Defendant to make that settlement, [* 504] which he pretended he had *already made, or was about to make. Whether a party, coming to the knowledge of a representation, not made to him, nor with any view to deceive him, but to which he gave credit, and upon the faith of which he acted, would be entitled to relief against the person, by whom that representation was made, it is unnecessary to discuss; as it is not alleged, that the marriage was contracted under any persuasion, that the purchased estates were settled, or intended to be settled, to the same uses as those that had been sold. It took place with full knowledge that they were not settled; and that the Defendant absolutely refused, notwithstanding a former proposal for that purpose, to make any settlement. The marriage settlement of Mr. and Mrs. Denton rests their claim to the purchased estates solely upon the erroneous supposition, that they were bought with the money produced by the sale of the settled estates.

There being then no original trust, no subsequent agreement, nor

any representation, upon which the Plaintiffs relied, there is no ground, upon which the Court, however it may disapprove part of the Defendant's conduct, can direct these purchased estates to be conveyed to the same uses as the settled estates, that had been sold (1).

Upon the supposition, that the Plaintiffs should fail in that relief, the bill prays, that the Defendant may be compelled to answer, not merely the money produced by the sale of the estates, but so much as they would now have been worth, if they had not been sold. Perhaps there would be nothing inequitable in the adoption of such a principle; but there would be great difficulty in its application; and I am not aware of any Decree, that has proceeded upon it. Therefore I can only consider the Defendant as a Debtor for the money produced by the sale; of which an account must be directed: also an account of the rents and profits of that part * of the settled estates, to which Mrs. Denton was entitled [* 505] immediately upon her mother's death, and of any timber cut upon that estate. Those parts of the Bill, upon which I am not able to make any Decree, must be dismissed without costs; and the Defendant must pay the costs of the rest of the suit.

1. As to the authorities for holding that trust moneys may be followed into land, when their appropriation to a purchase of that nature can be clearly traced, see, *ante*, note 6 to *Perry v. Phelps*, 1 V. 251, with the farther reference there given.

2. Where a man was under covenant to purchase lands and convey them to certain uses, lands subsequently purchased by him, though not conveyed to such uses, may be applied in satisfaction of his covenant; if there are no circumstances repelling the presumption that he made the purchases with that just intent: see note 5 to *Gartshore v. Chalie*, 10 V. 1.

3. As to the responsibility incurred by a false representation, upon the faith of which the party to whom it was made has contracted marriage, see note 2 to *Ainslie v. Medlycott*, 9 V. 13; but see the concluding passage of note 3 to the said case, that no claim in consequence of mistaken representation to a third person can be established by one who knew it, at the time, to be erroneous.

(1) *Ante*, *Perry v. Phelps*, vol. iv. 108; xvii. 173; *Lench v. Lench*, x. 511.

DEVERELL v. LORD BOLTON.

[1812, FEB. 20; MARCH 19.]

CONTRACT for the sale of an existing and a reversionary lease not specifically performed without a production of the title of the lessors.

The objection not waived by a premature conditional approbation of the title by the purchaser's Counsel: but the expense incurred in making out the title, before this objection was taken, repaid.

Purchaser under a Particular, giving a false description, not bound at Law or in Equity, nor by any act of his agent without a fresh authority or subsequent approbation: a different agreement requiring a fresh authority, [p. 509.]

Parol authority sufficient for a written agreement by an agent (a), [p. 509.]

Implied covenant by vendor of a freehold estate for the title, though an assignee under a Commission of Bankruptcy, selling by a general description, not restrained to his actual interest, [p. 512.]

Whether the effect of advertising for sale a lease in possession is precisely the same as a declaration, that the vendor cannot produce the lessor's title, *quære*, [p. 512.]

Approbation of Counsel not a waiver of all reasonable objections to the title, [p. 514.]

THE Plaintiff being in December, 1810, possessed of or entitled to a house in Upper Brook Street, Grosvenor Square, which he held for the residue of a term of ninety-one years, commencing from Lady-day, 1732, granted by the late Sir Thomas Grosvenor, and of a farther term of forty-five years and a half, demised by General Grosvenor by a reversionary lease, bearing date the 9th of December, 1805, and to commence from Lady-day, 1823, when the former lease would expire, the whole term in the said premises under the said leases being fifty-eight years from the preceding Michaelmas-day, the agent of the Defendant Lord Bolton entered into a contract with the Plaintiff's agent for the purchase of the premises for 7500*l*.

The particular represented the Plaintiff's interest in the premises generally as an unexpired term of fifty-eight years: but, binding the treaty, and before signature, the Plaintiff stated to the Defendant's agent, that the Plaintiff had renewed his lease with the present

General Grosvenor; and that such his reversionary or renewed lease comprised part of the term advertised for * sale [* 506] by the printed particular. The Defendant's agent on his behalf signed the following memorandum, indorsed on one of the particulars of sale, "Memorandum, I have this day purchased by private contract the property described in this particular, including the

(a) Even where a Statute, such as the Statute of Frauds, requires an instrument to be in writing in order to bind the party, he may, without writing, authorize an agent to sign it in his behalf, unless the Statute positively requires, that the authority also should be in writing. Story, Agency, § 50; 2 Kent, Com. (5th ed.), 613, 614; Chitty, Contracts, (6th Am. ed.) 210, 211, notes and cases cited; *Shaw v. Nudd*, 8 Pick. 9; *Terby v. Grisby*, 9 Leigh, 387; *Turnbull v. Trout*, 1 Hall, 336; *Ewing v. Tees*, 1 Binn. 450; *Talbot v. Bowen*, 1 Marsh. Ken. R. 436; 1 Sugden, Vend. & Purch. (6th Am. ed.) 132, [186]; *Mortimer v. Cornwell*, 1 Hoff. 351.

fixtures, at the price or sum of 7500*l.* ; have paid a deposit of 750*l.* ; and engage to pay the remainder within one month from the date hereof on having the assignments properly executed."—27th Dec. 1810.

The abstract being laid before the Defendant's Counsel he gave an opinion, recommending that, before Lord Bolton accepts the title, it should be completed by inserting full abstracts of the original lease, dated the 19th of September 1732, and of the leases 1st March 1745, and 20th December 1788 ; and, after some observations upon the title, and directing a search in the Registry Office, subject to those observations, and the result of the inquiry, approved the title.

The Plaintiff, after a fruitless attempt to induce the Defendant to forego the production of the several deeds on account of the difficulty of procuring them, complied with what was required ; and, farther abstracts being furnished to the Defendant's Counsel, a second opinion was given, suggesting some other parties as necessary, and stating, that in strictness the purchaser has a right to require the production of the title of the original lessor ; therefore Lord Bolton is not compellable to accept the title without the production of Lord Grosvenor's title to grant the original and reversionary leases ; adding, that he apprehended it would be impossible to produce this title : so that Lord Bolton must exercise his own discretion ; that considering all the circumstances attending Lord Grosvenor's title, the probability of quiet enjoyment under it is exceedingly great ; and it is also to be taken into consideration, that *a [* 507] marketable title to a house at the west end of the town is very seldom to be obtained.

The additional parties required were procured : but, the Defendant insisting upon a production of the lessor's title, the Bill was filed, asserting the Defendant's knowledge, that the Plaintiff cannot produce the lessor's title, representing the expense and trouble he had incurred, and praying, that the Defendant may be decreed, specifically to perform the contract by taking either an assignment of the Plaintiff's lease, or an under-lease, wanting a day of the whole term, and a declaration, that the Defendant is not entitled to require the Plaintiff to produce and establish the title of the lessors of the leases in possession and reversion, and an Injunction against proceeding in an action to recover the deposit.

After the answer was put in, admitting, that the subsisting and reversionary leases were stated in the abstract first delivered, and were respectively known to the Defendant's Counsel, when he gave his first opinion, but insisting on the objection, and that, the abstract being defective, he was not bound to take the objection in the first instance, a Motion was made for continuing the Injunction.

Mr. *Richards*, Mr. *Leach*, and Mr. *Cooke*, for the Plaintiff, in support of the Injunction contended, that the purchaser of a lease is not entitled to the production of the lessor's title ; secondly, that, if that objection could be maintained, it had under the circumstances of this case been waived.

Sir *Samuel Romilly*, and Mr. *Heald*, for the Defendant, observing, that the general question, whether the assignor of a [* 508] * lease is bound to produce his lessor's title is certainly a question of great difficulty, and has occasioned much difference of opinion among conveyancers, even upon the simple case of an existing lease, under which there has been possession, relied on the peculiarity of this contract, also for a future term: a power to grant reversionary leases being extremely uncommon, no person would take such an interest, unless satisfied of the power to grant it, and the Plaintiff taking him to be a man of common prudence, must be capable of giving that satisfaction. Admitting, therefore, the distinction of this case from *White v. Foljambe* (1), that this Defendant knew what he was purchasing, he cannot be compelled to perform the contract without seeing the right to grant this reversionary term.

March 19th. The Lord CHANCELLOR [ELDON].—The question for my determination in this cause is, not merely whether under these circumstances any proceeding could be maintained at Law against the Defendant, but whether the Plaintiff is entitled to have his contract specifically performed. The proposition, that the vendor of a leasehold interest cannot produce his lessor's title, is not to be represented as universally true. I know instances to the contrary. The vendor ought, therefore, where he sells with that restriction, to describe that it is the interest he has that is to be sold. In the case of *White v. Foljambe* an objection was taken of this sort, that such a description would damp the sale; and that is true: but, on the other hand, it is well worth consideration, whether this assistance by a Decree for a specific performance shall be granted to a vendor, who will not give a description, preventing mistake as [* 509] to that, which he * means to sell; admitting, that he has not disclosed, but has studiously refrained from representing, his title, as he knew it to exist.

As the fact is now agreed, that the Plaintiff cannot produce the lessor's title to make either the original or the reversionary lease, the questions are, 1st, whether that is an objection, not to the validity of the contract, but to relief in this Court by a Decree for a specific performance; 2dly, whether that objection, if it can be established, ought under the circumstances and transactions, that have since occurred, to be considered as waived.

Most, though not all, of the circumstances in *White v. Foljambe* occur here; and I have not the least doubt, that, if a house is put up to sale by the description of the residue of a term of fifty-eight years, as the vendor producing his title under the original leases and assignments, that, which he has so described, proves to be the residue of a term of ninety-one years, granted near a century ago, and a reversionary term of forty-five years, to commence thirteen or

(1) *Ante*, vol. xi. 337; see the note, 352.

fourteen years after the contract, it is utterly impossible, that the purchaser could either be called upon in this Court to accept such a title, or be subject to an action; but I go farther in this case; holding, that, when the Defendant's agent purchased under this particular without a fresh authority, no act done by him, unsanctioned by previous authority or subsequent approbation, can bind the Defendant either in Law or Equity: as an agent, though he may have a parol authority for a written agreement (1), cannot change the nature of his authority, but must have a fresh one for a different agreement.

* Under the circumstances of this case, however, it is [* 510] clear, that, after the Defendant and his Counsel knew, that this property was not such as was described, but was the residue of a term of ninety-one years, and a reversionary term of forty-five, there was enough to amount to approbation of the agent's act; which ought, therefore, to have the same effect as if he had been previously authorised to contract for the property under such circumstances.

With regard to the objection itself, it is, I know, stated with great confidence, and acted upon, by conveyancers, that the assignee of a lease has no right to inquire into the lessor's title; and it is stated with as little doubt, sanctioned by the practice of other conveyancers, some deceased, that he has a right to make that inquiry, and to ascertain, that he is really buying something. In considering the weight of the former opinion we must go a little farther, and apply the question to all the variety of leasehold interests. A lease, without possession taken under it, is one case. A long lease, like this, for ninety-one years, under which the lessee has been eighty years in possession, is a very different case. An immediate grant by tenant for life of a lease in possession is also a particular case, to be considered with reference to all the circumstances belonging to it; and a reversionary lease by tenant for life; who can make it only in execution of a power; and the fact deserves some attention, that there is hardly one tenant for life in fifty who has any power to make a reversionary lease. I am also to consider, not merely leases for fourteen or twenty-one years, but building leases, with covenants by the lessee to lay out, perhaps, 100,000*l.* upon the premises. The proposition would appear strong, that, such an interest being advertised for sale, the assignee is to take it, subject to the burthens, without knowing, whether the * assignor can produce the lessor's title. The assignor [* 511] may never have inquired, whether the lessor had any title: but, if he has satisfied himself upon that point, that does not give him a right to impose his satisfaction upon the purchaser. The question, however, as to a specific performance would be very different, when the Plaintiff admitted that he never made an inquiry,

(1) *Ante*, vol. x. 311; ix. 250, and the note.

and where he had made an inquiry, the result of which would satisfy any reasonable man, that he had, as his lessor had, a title.

There are other cases, such as I know existing : a lease made by a great family like this, a simple demise, not reciting whether it is made by virtue of an interest or power : a lease by tenant for life, reciting the power, under which he makes it, so that the lease appears to be conformable to the power ; the lease itself containing a reference to that power ; which would give the lessee a right to see that instrument for the support and maintenance of his title.

Beyond all these different cases we must, observing the practice of conveyancers, inquire of what species of leases it is predicated : is it to apply, not only to leases for years, but also to leases for lives, or leases renewable for ever ; and is the doctrine to be established, that, where the vendor does not by his advertisement take care, that there shall be no dispute, the purchaser is to be compelled in a suit for a specific performance of the contract to take the subject, be the value what it may, where the Court itself cannot say, whether it is any thing or nothing, that the one is to convey, and the other is to be compelled to accept.

I again advert, as I did (1) in *White v. Foljambe*, to [* 512] * the case of *Pope v. Simpson* (2), decided by Lord Rosslyn ; who, though the vendor of a freehold estate covenants to make a good title, whether he says any thing about it or not, thought, that assignees under a Commission of Bankruptcy are to be considered as selling only the interest which the bankrupt had. My clear opinion is, that advertising to sell a freehold estate they undertake, whether they say so or not, to make a title. There is no doubt, that purchasers upon such sales will not bid so readily, and will be very cautious and wary : but the necessity of requiring them to advertise what they mean to sell arises from this, that it is quite impossible for a Court of Equity specifically to perform the contract of a vendor, admitting, that he did not choose to describe the subject, as it was, lest an honest disclosure of its actual state should put it into the hands of the vendee at a lower price. A Court of Equity cannot lend its assistance to such a purpose. The answer, therefore, to all the difficulty, said to be imposed upon lessees selling their leases, is, that there is no difficulty, which they do not create themselves by not advertising the purchasers, how they can deal with the subject, when they come to execute the contract.

It is not, however, here necessary to determine, whether the effect of advertising for sale a lease in possession is precisely the same as a declaration, that the vendor cannot produce the lessor's title ; a question not yet settled by the practice of conveyancers ; which is always much regarded by the Court. In this case another solid objection appears. One subject of this purchase is a reversionary lease

(1) *Ante*, vol. xi. 343, 5.

(2) *Ante*, vol. v. 145 ; see the note, 147.

to take effect in 1823 : the title to grant which lease is not proved, as in its nature it cannot be, by possession under it. Here is, therefore, no enjoyment, giving a sanction to the opinion, that the lessor by virtue * either of his interest or his authority [* 513] could create that reversionary term. Secondly, this term is not merely reversionary, but is granted by an individual, who is not the lessor in the original subsisting lease ; and farther, there is no connection whatsoever proved by the instrument of lease, that the person, making the reversionary lease, has derived from the maker of the lease in possession, either by the inheritance, or a particular estate in the property, connected with a power to demise, that would bind those having the inheritance. These two individuals, though they happen to be of the same family, must be considered for this purpose as strangers to each other : the one having had the inheritance seventy years ago : the other having now either the inheritance or a particular estate. It is not shown, that there is any connection of title between those two ; and there is no farther evidence of the latter's right than the mere fact, that he made the lease in reversion. The probability from the circumstance, that he is descended from a great family, if any reliance is to be placed upon that, is, that he was only tenant for life : and I repeat my opinion, that, if tenant for life agrees to make a reversionary lease, this Court ought not specifically to perform the contract without seeing his right to make it ; as there can be no possession ; and the question upon such a reversionary lease is, whether this Court is to compel a purchaser at the instance of the vendor to take an interest, so described, that the Court cannot say, that the purchaser, whatever may be the price he pays, is to take any thing or nothing.

Whatever therefore may be the true doctrine as to the sale of a lease under which there has been possession, of itself always considerable evidence of title, I will not specifically perform a contract for the assignment of a reversionary lease, under which there cannot * be possession, without some better evidence, that [* 514] it is a subsisting term, by either a competent interest, or a power, than the mere execution of such a reversionary lease, and a covenant, which there must be, that it is still a subsisting lease, unaffected by any act the party has done.

There is in this case another question, of considerable difficulty, whether under the circumstances these objections are waived. The ground, upon which that is maintained, is, that the conveyancer in his first opinion conditionally approved the title. Suppose it stopped there ; and some other person had suggested, that the advice to the purchaser ought to have been to look farther ; that it was for him to determine, whether he would take the chance of the reversionary lease having granted any thing or nothing : with that solitary circumstance of such advice given by a third person would it not be strange to compel a specific performance upon the mere ground, that Counsel had given an opinion, which the Court may think wrong ? The information, required by the first opinion, produced

other objections with reference to subjects, upon which the Counsel had approved the title : and then in his second opinion he calls the attention of the purchaser to this, as a subject of discretion for his own consideration. It is too much to say, that, where an abstract is laid before Counsel, who approves the title, his approbation is to be taken, as against the person consulting him, as a waiver of all reasonable objections. That would carry the doctrine of waiver to an extent, of which I do not know an instance.

The conclusion is, that the Plaintiff has incurred some trouble and expense in clearing the title of difficulties (which expense, I think, ought to be repaid), before it occurred to the Counsel, [* 515] that he ought to suggest * to the purchaser the necessity of determining for himself upon this objection as to the reversionary lease. Whatever therefore may be the case at law as to the validity of this contract, and the Plaintiff's right to recover what he has expended, which I hope he will not be put to agitate (1), this Court ought not specifically to perform such an agreement.

1. As a general rule, a lessee who has contracted for sale of his leasehold interest, cannot compel a specific performance without showing a good title in his lessor, unless the vendee had notice that it could not be produced ; but a distinction has been made in the case of a bishop's lease ; for the grounds of which, see, *ante*, note 9 to *Cooper v. Denne*, 1 V. 565.

2. Immaterial errors of description will not invalidate a sale, when the error was unintentional, and not designed to mislead : see note 2 to *Calverly v. Williams*, 1 V. 210.

3. An authority to an agent to enter into a contract respecting real estate, need not be in writing ; but the court will see that the authority has not been exceeded : see note 6 to *Coles v. Trecothick*, 9 V. 234.

BIRMINGHAM CANAL COMPANY v. LLOYD.

[1812, MARCH 20, 21.]

INJUNCTION against draining, preparatory to opening a coal-mine, with prejudice to a canal, before establishing the right at law, refused upon laches for two years, permitting expenditure (a).

Injunction against using water injuriously to a mill ; putting the Plaintiff to go to Trial forthwith (b), [p. 516.]

THE Plaintiffs, being authorised by an Act of Parliament, 21 Geo. III. to make reservoirs for supplying the canal with water, had applied to that purpose some pieces of water, called Broadwater,

(1) It was said at the Bar, that the Defendant would not object to reimburse that expense.

(a) Preliminary injunctions are allowed in order to prevent immediate injury ; not remote and contingent damage. *Rochester v. Curtiss*, 1 Clarke, 336. It ought not to be granted unless the injury is pressing, and the delay dangerous. *New York Printing Co. v. Fitch*, 1 Paige, 97. See also *Arthur v. Case*, 1 Paige, 447 ; *Ogden v. Kip*, 6 Johns. Ch. 160 ; 1 Barbour, Ch. Pr. 608, 609.

(b) Where by the delay the injury might be irreparable, a preliminary injunc-

arising from the subterraneous communication of water in some exhausted coal-mines. The Defendants, who were proprietors of neighboring coal-mines, in consequence of a previous promise to the Plaintiffs, gave them notice in April, 1810, of the intention of the Defendants to open an old sough, or level, made for the purpose of draining the exhausted mines, and at the expiration of six months to draw off the water, preparatory to working their mines. A counter-notice was given by the Plaintiffs, that they would sue the Defendants at Law for damages, if they should proceed. The Defendants having proceeded, before they commenced to work their collieries the Bill was filed, praying an injunction against opening or proceeding with any sough, drain, or channel, connected or communicating with the said pools or pieces of water, or in any other manner draining any of the water from the said pool or reservoir of Broadwater, by means whereof the said canal or navigation may be injured.

* *Sir Samuel Romilly* and *Mr. Benyon*, for the Plaintiffs, moved for an Injunction upon affidavits, stating an expenditure by the Defendants of 2000*l.* in erecting fire engines, &c.

Mr. Hart and *Mr. J. Martin*, for the Defendants.

The Lord CHANCELLOR [ELDON].—Assuming for the present purpose this piece of water called Broadwater, to be a reservoir within this act of Parliament, the Plaintiffs must establish their right to damages at law, before I ought to grant this Injunction. I proceed here upon the circumstances of delay. The Defendants having in pursuance of their promise to give six months' notice of beginning to work their mines given notice in April 1810, expressly mentioning their purpose to open the *sough*, the Company having given a counter notice that they would in that case seek damages at law, and, having a right to apply promptly to this Court to prevent the act, instead of taking that course, permit the Defendants to expend 2000*l.* in proceeding towards getting coal by erecting fire-engines, &c. and, when they are about to get the coal, the Plaintiffs come for an Injunction. They ought to have commenced their opposition, when they could have done so with justice; and, though this is not the case (1) before Lord Hardwicke of stopping a colliery actually working, yet the act of stopping or draining a colliery about to be wrought may possibly with reference to rival ownerships be the means of making it absolutely unproductive twelve months hence, when it is to be wrought, instead of at the present time.

* I have seen the Injunction granted in *Lord Byron's* [* 517]

tion will be granted, as for example: where hydraulic works are erected by different persons on both banks of a private stream, and the owner of the mill on either side attempts to deprive the other of the use of an equal share of the water of which he has been in the quiet enjoyment, and thus to destroy his mills. *Arthur v. Case*, 1 Paige, 447.

As to the practice of issuing injunctions in cases of trespass, on the principle of irreparable mischief, see, *ante*, note (b) and (c) *Hanson v. Gardiner*, 7 V. 305.

(1) Amb. 209.

Case (1) by Lord Thurlow; who, though the Plaintiff applied immediately, put him to go forthwith to trial.

These Plaintiffs therefore, not having applied until nearly two years after the notice was received, must take their chance at law; and this Court ought not to interfere by granting an Injunction.

A PLAINTIFF who has lain by, and suffered the defendants to expend large sums upon an undertaking, before he applies for an injunction to stop it, will be told he comes too late: a plaintiff is not bound to show actual injury to his property in order to entitle him to an injunction; he comes very properly for that protection whenever he can show any real danger of such injury, and there are no peculiarities in the case, rendering his application premature: *Corporation of King's Lynn v. Pemberton*, 1 Swanst. 252: but vague apprehension of a defendant's intention to commit acts in the nature of waste will afford no ground for issuing an injunction: see, *ante*, note 2 to *Hanson v. Gardiner*, 7 V. 305.

ANONYMOUS.

[1812, APRIL 16.]

ORDER to examine a party, saving just Exceptions, of course on the suggestion of no interest, refused, where an interest appeared (a).

MR. WINGFIELD, for the Plaintiffs in a supplemental Bill, filed by the assignees under a Commission of Bankruptcy, moved to examine the bankrupt, saving just exceptions; stating an objection from the interest of the bankrupt, as being liable to costs in the original cause; and referring to the case of *Hewetson v. Tookay* (2).

The Lord CHANCELLOR [ELDON].—The Court, in making this Order for the examination of a party, saving just exceptions, proceeds upon the allegation, that he has no interest; and, if it perceives an interest, will not make the Order even upon the supposition, that the interest may be released before the examination: much less will it make the parties incur the expense of having the objection of interest taken at the hearing, upon which objection, if taken upon a Motion, the Court would not have made such an Order. There are, I am sure, cases, besides that one mentioned, which I have formerly had much occasion to consider. All the practice shows that upon the suggestion of no interest, the Motion [* 518] is made as of course: *but the Court does not give such credit to the suggestion, as not to afford the person, who has no notice of that, an opportunity of taking the objection,

(1) *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *ante*, *Jackson v. Cator*, vol. v. 688; *Dann v. Spurrier*, vii. 231.

(a) 2 Barb. Ch. Pr. 181; *Corning v. Barter*, 6 Paige, 178; 2 Madd. Ch. Pr. 417; 1 Smith, Ch. Pr. 295.

Where a plaintiff desires the evidence of a co-plaintiff, see, *ante*, note (a) *Motour v. Mackreth*, 1 V. 142.

(2) 2 Dick. 799.

that there are just exceptions : but if the Court itself perceives, that the suggestion, upon which the Order goes, is not true in fact, it will not burthen the suitors by making such an Order.

No Order was made (1). _____

See note 1 to *Seton v. Slade*, 7 V. 265.

THE ATTORNEY GENERAL v. WILSON.

[ROLLS.—1812, APRIL 20.]

LEASES of Charity Estates for twenty-one years, the lessors being not mere trustees, but having also a beneficial interest, set aside as breaches of trust by undervalue.

THE Information, stating the foundation of the Free School of Pocklington in the fifth year of King Edward VI., and indentures in the first year of Queen Mary, giving lands to the Master and Usher, and their successors for ever, to hold in trust for the maintenance of the School, complained of several leases of the Charity Estates, for twenty-one years, at very low rents, viz. the 13th of August, 1800, at the annual rent of 3*l.*, the value, to be let, being 92*l.* per annum : the 3d of December, 1800, rent 2*l.* 13*s.* 4*d.* ; annual value 141*l.* : 12th December, 1800, rent 1*l.* 2*s.* 6*d.* ; value 35*l.* : 26th November, 1804, rent 1*l.* 13*s.* 4*d.* ; value 26*l.* : and 23d November, 1805, rent 5*l.* ; value 132*l.* On the death of the late Master in 1807 the Relator was appointed,

The Information, charging, that the whole of the rents amounting to no more than 63*l.* 12*s.* 6*d.* is very inadequate to the support of the School, and that the granting such leases was a breach of trust, prayed, that the Defendants may be decreed to deliver them up to be *cancelled ; and to account for the full [* 519] value since the death of the late Master ; and a reference for a scheme for letting the estate agreeably to the intention of the founder.

Sir Samuel Romilly and Mr. Bell, in support of the Information : Mr. Hart and Mr. Shadwell, for the Defendants.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT] (preventing the Reply) made the Decree, setting aside the leases ; referring to his judgment in the *The Attorney-General v. Magwood* (2) ; and observing, that, having then had much occasion to consider this subject, he found several cases in Duke, Vernon, and Modern Reports, particu-

(1) See *Walker v. Wingfield*, ante, vol. xv. 178, and the note, 179.

(2) *Ante*, 315 ; *Attorney General v. Brooke*, 319 ; *Attorney General v. Backhouse*, vol. xvii. 283, and the references in the note, vi. 453, *Attorney General v. Green*.

larly *The Attorney-General v. Gower* (1); that the short duration of the term was immaterial; and the only distinction of this from the late cases was, that in those the lessors were mere trustees, and in this instance they had also a beneficial interest: but such leases are not to be encouraged on account of the inconvenience both ways; the trustees not doing their duty; and the lessees getting the land at a low rent.

SEE the note to *The Attorney General v. Green*, 6 V. 452.

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DIXON v. SHUM (2).

[1812, MARCH 18.]

SERVICE of Subpœna to hear Judgment necessary; though the Cause was set down under the Order upon a peremptory undertaking to speed the Cause. Order on a peremptory undertaking to speed the Cause entered *nunc pro tunc* of course on Motion without notice above two years afterwards.

THE Defendant on the 21st of February, 1809, moved to dismiss the Bill for want of prosecution; when the Plaintiff gave the usual undertaking to speed the cause. On the 19th of November following the Defendant repeated his Motion; and, the Plaintiff undertaking peremptorily to speed the cause, an Order was made, that he should go to Commission in the Vacation, and give rules to pass publication in Trinity Term next, setting down the cause, &c. or in default that the Bill should be dismissed with costs, to be taxed, without farther Motion.

The Plaintiff complied with that Order by giving rules to pass publication; and actually set down the cause: but he did not serve a subpœna to hear judgment. In November 1811 the cause, standing in the paper, was called on, and struck out; no person appearing for either the Plaintiff or the Defendant. On the 23d of January 1812 the Defendant, not having drawn up the Order of the 19th of November 1809, by a motion of course obtained an Order to enter that Order of the 19th of November 1809, *nunc pro tunc*; and proceeding to tax the costs, the Plaintiff moved to discharge the Order of January 1812 with costs for irregularity.

Mr. *Johnson*, for the Plaintiff, insisted, that the last Order for entering the former Order *nunc pro tunc*, was obtained irregularly by a motion of course, after such a lapse of time, instead of notice; that the Plaintiff had complied with his undertaking; and that,

[* 521] the cause being *set down in pursuance of the undertaking, it was not necessary to serve the subpœna to hear

(1) 9 Mod. 224.

(2) *Ex Relatione*.

judgment; both parties being apprised by the Order, that the cause would be set down.

Mr. *Cooke*, for the Defendant, submitted, that the last Order was regular. There is no distinction between setting down a cause in the ordinary course and under the peremptory undertaking: in neither case can it be set down without serving the subpoena to hear judgment: the words "setting down the cause" in the Order meaning setting it down in the usual way, and accompanied with the usual notice. There is nothing in print relative to this practice: but it is understood in the Six Clerks' Office, that in such a case the subpoena must be served.

The Lord CHANCELLOR [ELDON] expressed his opinion, that the Defendant was regular; that the real question was upon the meaning of the words "setting down the cause;" which in the absence of authority must be taken to be setting it down in the usual manner, serving the subpoena to hear judgment; and there is no instance of a Plaintiff in a cause, set down under the peremptory undertaking, in the absence of the Defendant taking such Decree as he can abide by without a subpoena to hear judgment.

His Lordship therefore ordered the Plaintiff to pay the costs of the former Order and of this application; but as there was some doubt of the practice, and the Plaintiff might have been mistaken, gave leave to set down the cause again, serving the subpoena to hear judgment.

WITH respect to the dismissal of suits for want of prosecution, see, *ante*, the notes to the *Anonymous case*, 2 V. 287. As to the importance of serving a subpoena to hear judgment, see the note to *Stubbs v. —*, 10 V. 30; but, by the bill now before Parliament for the regulation of chancery practice, it is proposed that service of such subpoena on the clerk in court of any party shall be deemed good service on the party.

JAMES v. DOWNES.

[1811, Nov. 2, 20; Dec. 5. 1812, APRIL 23.]

INJUNCTION against proceeding at Law only on some default either of Appearance or Answer (a).

Injunction, dissolved on the Answer, not revived of course without special Motion or amendments verified by affidavit (b).

Contempt by breach of Injunction by Defendant, present in Court during the Motion, though retiring before the Order pronounced: but Motion to commit after a considerable lapse of time, and the Order not drawn up, refused with costs (c).

THE original Bill prayed an injunction against proceeding at law upon a bond; and the Defendant Downes, having on praying time to answer obtained the usual Injunction, staying execution, died, not having put in an Answer. A Bill of Revivor and Supplement was filed against his executors; and upon the merits disclosed in their answer the Injunction was dissolved. The executors then sued out a *Scire Facias* to revive the judgment obtained by the original Defendant; and the Plaintiff, having entered an appearance at law, amended the Bill; and before appearance of the Defendants in equity moved for an Injunction to restrain execution or other proceeding. The Motion having been refused, was renewed after appearance, before the time for answering had expired.

Sir Samuel Romilly and Mr. Treslove, for the Plaintiff, relied on the case of *Edwards v. Jenkins* (1).

Mr. Hart and Mr. Whitmarsh, for the Defendants, contended, that the practice was against that case; in which, though Mr. Dickens states, that the Lord Chancellor granted the Injunction, the Defendants having prayed a *Dedimus*, the Order, according to the Register's Book, states only, that the Defendants had appeared. They referred to an *Anonymous Case* (2) before Lord Hardwicke, *Travers v. Lord Stafford* (3), *Gad v. Worrall* (4), and *Lane v. Williams* (5).

[* 523] *The Lord CHANCELLOR [ELDON].—Upon an original

Bill the Plaintiff cannot have an Injunction until some default by the Defendant, either by not appearing or by not answering; the time in either instance having expired (6). When this Motion was first made, I had no recollection of the case, that I now find determined by Lord Thurlow; that if after an Injunction dissolved upon the Answer to the original Bill the Plaintiff amends, by that amend-

(a) 2 Madd. Ch. Pr. 218.

(b) 1 Smith, Ch. Pr. 624-627; 2 Madd. Ch. Pr. 352; Eden on Injunc. (2d Am. ed.) 146, 148, *et seq.* and notes; 1 Barbour, Ch. Pr. b. 1, ch. 7, § 2, p. 223, 224, 617.

(c) 2 Madd. Ch. Pr. 225.

(1) 3 Bro. C. C. 425; *Edwards v. Edwards*, 2 Dick. 755.

(2) 3 Atk. 694.

(3) 2 Ves. 19; Amb. 104.

(4) 2 Anstr. 553.

(5) *Ante*, vol. vi. 798.

(6) *Ante*, *Anderson v. Darcy*, *White v. Klevors*, 447, 471.

ment infusing into the record an equity, supposing the allegations true, sufficient as the foundation of an Injunction, he may apply : but he cannot, I apprehend, until default by the Defendant ; and then he does not move for the Injunction upon the amended Bill, by reason merely of that default ; but, taking that as one ground, he moves for the Injunction, verifying the truth of the amended Bill by affidavit ; and then, if there is both default by the Defendant, and an equitable case proved by the affidavit of the Plaintiff, the Court, giving credit to the Bill in the first instance, if there is also a default by the Defendant, in the latter does not give credit to the Bill, as the second proceeding, unless besides the default the Bill is also verified by affidavit : but until some default the Plaintiff cannot be entitled to the Injunction : for instance, unless the time for answering has expired without an answer, no verification of the Bill will do. If Lord Thurlow meant to lay down, that though there was no default by the Defendant, the mere verification of the amended Bill was sufficient, with all deference I do not agree to that (1).

This Motion, therefore, if made before the time for answering was out, was made prematurely. The case, however, has so much singularity, that I cannot give costs.

* It was then said, that, the time for answering having [* 524] expired pending the Motion, an Injunction was sealed for want of an Answer : but the Lord Chancellor refused to take notice of that circumstance, saying, the Plaintiff must move again (2). Soon afterwards the Order for an Injunction was pronounced in Court. The Defendants, finding no Order was drawn up, proceeded to execution ; upon which the Plaintiff moved to commit them for a breach of the Injunction, stating, that they were present in Court, when the Order was pronounced ; or when the Motion was made ; and referring to the case of *Hearn v. Tennant* (3).

April 23. The Lord CHANCELLOR.—A party cannot be committed for the breach of an Injunction, that express species of contempt, unless there is an injunction : on the other hand, if he was present, when the Order was made, the Court will not permit him to elude its justice by doing that, before the Injunction is sealed, which, if it was actually sealed, would be a contempt : but there is no instance, previous to the case of *Hearn v. Tennant*, that the Court ventured to considered the act of contempt, unless the party, being present in Court, heard the Order for an Injunction made. My opinion on that occasion was, and still is, that, if the party was in Court, while the Motion was proceeding, he should not by turning his back, before the Court pronounced the Order “let the Injunction go,” escape the process ; considering it a mere contrivance : but the Court can

(1) *Vipan v. Mortlock*, 2 Mer. 476. See the references, *ante*, vol. xi. 569, *Norris v. Kennedy*.

(2) *Travers v. Lord Stafford*, 2 Ves. 19.

(3) *Ante*, vol. xiv. 136 ; see the note, 137 ; *Kimpton v. Eve*, 2 Ves. & Bea. 349.

never intend, that the Plaintiff, having obtained the Order granting the Injunction, is to lie by for four months, as if it had not [* 525] been granted. The Court, interposing to * assist the Plaintiff, and prevent his losing the benefit of the process, while he is actually pursuing it, cannot consider him entitled under the Order for three or four months together.

Therefore dismiss this Motion with costs.

1. EXCEPT in special and urgent cases, an injunction is not granted before answer, or default of answer, or application for time to put in the answer: see, *ante*, note 1 to *Cousins v. Smith*, 13 V. 164; but, when the regular time for answering is expired, it is not necessary that process of contempt should issue previously to the injunction: *Vipan v. Mortlock*, 2 Meriv. 476; *Edmonds v. Savary*, 3 Meriv. 304.

2. After an injunction has been dissolved on the merits, and the bill has been amended, a motion to revive the injunction must be special, and on notice: see note 1 to *Lady Markham v. Dickenson*, 1 V. 30, and note 1 to *Norris v. Kennedy*, 11 V. 565.

3. A party who has full notice, in any way, that an injunction has issued against him, is guilty of a contempt if he do any act prohibited by such injunction, although the order may not have been regularly served upon him: see the note to *Osborne v. Tennant*, 14 V. 136.

BAGLEHOLE, *Ex parte* (1).

[1812, APRIL 20; JUNE 13, 16, 19; JULY 15.]

RESIDENCE of a British subject in an Enemy's country for the purpose of a trade, licensed by the Government of this Country, not a disability to sue or take out a Commission of Bankruptcy.

Commerce by a person resident in an Enemy's country, even as representative of the Crown of this country, illegal, and the subject of prize, however beneficial to this country, unless authorized by license (a), [p. 528.]

THE Petition prayed, that a Commission of Bankruptcy against the Petitioner and Joseph Redgrave may be superseded. The objection, stated by the Petition and Affidavit to the petitioning creditor's debt, for goods sold and money advanced between November

(1) 1 Rose's Bank. Cases, 271.

(a) If a person has a settlement in a hostile country by the maintenance of a commercial establishment there, he will be considered a hostile character, and a subject of the enemy's country, in regard to his commercial transactions connected with that establishment. If a person goes into a foreign country, and engages in trade there, he is, by the law of nations, to be considered a merchant of that country, and a subject, to all civil purposes, whether that country be hostile or neutral; and he cannot be permitted to retain the privileges of a neutral character, during his residence and occupation in an enemy's country. 1 Kent, Com. (5th ed.) 74, 75; *Wilson v. Marryat*, 8 T. R. 31; *The Indian Chief*, 3 Rob. 12; *The Anna Catharina*, 4 Rob. 107; *The President*, 5 Rob. 277; *Lord Stowell*, 1 Hagg. Adm. 103. The same principle has been admitted in the Courts of the United States. *Sloop Chester*, 2 Dallas, 41; *Murray v. Schooner Betsy*, 2 Cranch, 64; *Maley v. Shattuck*, 3 Cranch, 488; *Livingston v. Maryland Ins. Co.* 7 Cranch, 506; *The Venus*, 8 Cranch, 253; *The Frances*, 8 Cranch, 363.

1810 and May 1811, was, first that it was composed in part of goods, in which Bryant, the petitioning creditor, was a partner with the bankrupt: secondly, that at the time of striking the docket, and when the debt was stated to have been contracted, Bryant was a partner with Stephen Smart, who for nearly three years last past has been, and now is, resident and trading at Rouen, or elsewhere within the French Dominions; and is therefore an alien enemy; without which he could not carry on business, and remain free and uninterrupted. The affidavits against the petition stated, that Smart did not either in his own name or in the name of his house of Smart, Bryant, and Co. or in any other name in any part or parts or territories or dependencies of the French Dominions, carry on any trade, &c. except that he and the deponent, his clerk, having * had no fixed residence in France, lived there at hotels; [* 526] his letters being directed under cover to other persons; and the only purpose, for which they were in France, was to receive from different houses in that country to whom consignments were made from England by the house of Smart, Bryant, and Co. by virtue of licenses from the King in Council, payments for such consignments, either in money, or in other goods to be remitted to England: that Smart did not leave this country until October 1809; about which time he was seen at Amsterdam, provided with licenses from the King in Counsel to ship grain and other articles to this country; and within two or three weeks afterwards he went to France.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Cullen*, in support of the Petition.—The only circumstance in which the case differs from *Mr Connel v. Hector* (1) the allegation, that Smart was not in France for the purpose of carrying on trade, but was merely collecting debts for consignments, made under licenses from the government of this country, cannot make a distinction. Though Lord *Alvanley* speaks of carrying on trade, the disability cannot depend upon that circumstance, or the nature of the trade. The ground is, that he was adhering to the King's enemies, owing a temporary allegiance to, and protected by, them; whether residing there for the purpose of carrying on trade, or of using the assistance of their Courts for the recovery of debts, &c. The reason stated by *Rooke*, Justice, that the fruits of the action may not be remitted to a hostile country to furnish resources against this country, applies equally to this case. This permanent domicil from October 1809 cannot be represented as a temporary residence merely to collect debts.

* The affidavits against the petition are expressed in [* 527] singular terms, if intended to exclude any purpose of trade; denying that purpose with an exception, which amounts to an admission of it; leaving this country with licenses to ship grain, &c. on occasion of the scarcity here, and going to France, and remain-

ing there, to receive payment for consignments exported from this country. The result is an admitted commercial partnership existing at this moment; under which Smart is acting as a French merchant, and his residence for that commercial purpose. He must be there either as a prisoner, or by permission as a subject; not having any character, in which the Law of this country permits a domicile in the country of an enemy.

Mr. *Leach*, Mr. *Montague* and Mr. *Rose*, for the Assignees.—This partnership is at this time engaged in trade with France under existing licenses; and the individual partner is in France conducting that trade. The question is, whether, having gone to Holland under license for the purpose of conducting a licensed trade, and having for that purpose lived ever since in some part of the enemy's territory, he is incapable of bringing an action, and therefore of supporting a Commission of Bankruptcy, in this country. The right of suit is denied to an alien enemy on the clear ground, stated by *Rooke*, Justice, that the fruits of the action may be remitted, and furnish resources to the hostile state. The residence, supposed by Lord *Alvanley*, is within the same reason as that of a foreign subject, employing his industry and capital for the benefit of a foreign state. This person is not devoting his industry and capital to the benefit of a foreign state. Residing there for the sole purpose of this licensed commerce, authorized by the policy of this [* 528] country, he must be considered as * carrying on British commerce, as if he was resident here. The direct object of his residence is draining that country of resources to be remitted to this. Commercial transactions with the enemy, permitted by license, must be considered as advantageous to this country: and, independent of the license, here is no commercial adherence within the principle stated by Lord *Alvanley*, nor protection by the enemy: the affidavits representing Smart as living in concealment and under an assumed name. In *Kensington v. Ingles* (1) the suit of an alien enemy by a British agent, under a policy of insurance in a trade authorised by license, was maintained.

Sir *Samuel Romilly*, in reply.—Every license is to import or export a particular cargo, not to trade generally; and residence there for that purpose could not be necessary. It might as well be contended, that an enemy, whose cargo was imported into this country by license, could sue. This residence must be considered voluntary for the personal objects of the individual; falling directly within *M'Connell v. Hector*. The answer to the supposed effect of these transactions by draining the enemy's country is, that from the nature of all trade it is advantageous to both countries.

The Lord CHANCELLOR [ELDON].—I have not facts before me sufficient to enable me to say, what is the Law upon this case. Though *prima facie* the demand of a party resident in France during

this period could not be sustained, he might be actually there under such circumstances, that it might be very well sustained for the whole or a part. * Though it might be a very [* 529] beneficial act in a subject of this Country to purchase corn in France and send it to this Country at the present period, yet, if he was there without license to trade, to reside and trade, such commerce would be clearly illegal; and even that property would be liable to capture and condemnation. It is on the other hand equally clear that the Crown may authorise residence in an enemy's Country: but the person, residing there under that authority, may so lend himself to the enemy's purposes as in a question with this country to identify himself with the foreign state. The Prize Courts have frequently determined, that, if a person, residing by license in an enemy's Country, even the representative of the Crown, should trade there, he is not in that character representing the Crown, but is lending himself to the purposes of the enemy, and his property therefore would be lawful prize.

I must before I can decide upon this petition, be informed, what was the state of the account, what were the actual licenses with reference to trading and to residing, and to what extent, in that period between November 1810 and May 1811. My present opinion is, that if a person, having a license to travel and reside, and to export corn and other specified articles to this Country, used that license beyond its expression for the purpose of dealing in other articles, to which it had no relation, he could not maintain, that such dealing was not an enemy's dealing.

June 13th. The Lord CHANCELLOR [ELDON].—As to the objection to the debt of the petitioning creditor, that this partner was resident and domiciled in *the Country of the [* 530] enemy, and consequently could not maintain an action or a Commission of Bankruptcy, if his existence in a foreign Country was for a purpose, licensed by the Crown of this Country, that forms no objection to the debt; and, looking at these licenses, I cannot upon the affidavits say, there is more of existence there than belongs to that purpose. If however the bankrupt can establish before a Jury, that under that pretence there was a purpose of residence and domicile in that Country, I will not prevent his trying it, if he thinks proper.

The other ground of objection, that upon a fair account there is not sufficient to constitute a petitioning creditor's debt, depends upon so many suggestions as to particular transactions, that, if it is to rest upon that, the Commissioners must look at the account.

Directions were afterwards given for an action, to be brought by the petitioning creditor, undertaking to confine his evidence to such debt as was due at the date of the Commission, the bankrupts not setting up their bankruptcy; but upon the objection that, being

matter of account, it could not be tried in an action, an issue was proposed; which was afterwards withdrawn, and the petition dismissed by consent.

1. This case is likewise reported in 1 Rose, 271.

2. Mere residence in an enemy's country is not sufficient to establish such an adherence to the enemy as will disable the party so resident, from suing out a commission of bankruptcy: *Roberts v. Hardy*, 3 Mau. & Sel. 533. But if, to a bill filed in our courts, a plea is put in, distinctly averring that the plaintiff is adhering to the King's enemies, upon proof of that plea the bill will be dismissed: *Albrecht v. Sussman*, 2 Ves. & Beat. 326, 329; *Daubigny v. Davallen*, 2 Anstr. 467.

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PROMOTIONS.

On the 29th of May, 1812, the first day of Trinity Term, Sir VICARY GIBBS, His Majesty's Attorney General, was called to the degree of Serjeant at Law; and was appointed one of the Judges of the Court of Common Pleas, on the resignation of LAWRENCE, Justice.

Sir THOMAS PLUMER, Solicitor General, was appointed Attorney General; and Mr. GARROW was appointed Solicitor General; and received the Honor of Knighthood.

In 1813, on the creation of the office of Vice Chancellor, to which the Attorney General was appointed, he was succeeded by Sir WILLIAM GARROW as Attorney General; and Mr. DALLAS was appointed Solicitor General; and received the Honor of Knighthood.

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2. A person becoming entitled to an estate, subject to a charge for his own benefit, may keep up the charge. Distinction upon this subject in law and equity: the latter sometimes holding a charge extinguished, where it would subsist at law; and sometimes preserving it, where at law it would be merged; depending on the intention, actual or presumed, of the person, in whom the interests are united. Where, as in most instances, it is, with reference to the party himself, of no sort of use to have a charge on his own estate, it will sink without some act by him to keep it on foot. 390

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being a party, and collusion with
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1. Devise, subject as to part to a devise to trustees and their heirs for debts in aid of the personal estate, and as to part to mortgages in fee to sons, and a daughter, and their respective issue male in strict settlement, &c.; with power to the sons respectively, when in possession to convey or appoint all or any part to trustees on trust by the rents and profits to raise a rent-charge as and for a jointure for any wife or wives for each such wife's natural life only; and also to charge portions by deed, and to lease for twenty-one years. Execution of the power by conveyance to trustees and their heirs on trust by the rents and profits to raise and pay a jointure during the wife's natural life only; and charging portions; with covenant for title, and for quiet enjoyment by the trustees during the natural life only of the wife. As to the estate of the trustees at law, *quære*: the Court of King's Bench certifying, that they took an estate in fee; and the Court of Common Pleas, that they took no estate whatsoever. Recovery by tenant in tail, the tenants for life being dead, the mortgages outstanding, the debts unpaid, and the trustees for the jointure not parties, valid; as an equitable recovery, if those trustees took a fee: as to the equitable estates, viz. subject to the debts and mortgages, if an estate for life; and, as to the legal estates, if a limitation in a deed can be reduced by implication, the cir

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cumstances, that the purpose did not require a fee, that it might disturb subsequent estates in the instrument creating the power, and the restraint of the covenant for quiet enjoyment to the wife's life, could not prevail against the legal effect of the limitation to the trustees and their heirs. The proper mode of executing such a power is limiting a rent-charge to the wife by way of jointure, secured, if not by the ordinary power of entry and distress, by a trust term for ninety-nine years, with a proviso for cesser on payment of the jointure during her life, and all arrears at her death. *Wykham v. Wykham.* 395

2. Distinction upon the execution of a power in Law and Equity; a strict, literal, i. e. a due, execution, the same in both; but, though void at law, the substantial intention, upon meritorious consideration, enforced in equity. *Wykham v. Wykham.* 395

3. Non-conformity of the nature of estates, raised by the execution of a power, to those in the instrument creating it is not of itself sufficient to reduce the legal effect of the latter instrument by reference to the former. 416

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3. Order, after the bill dismissed, for payment of money out of Court. *Wright v. Mitchell.* 293

4. Costs not given on a Motion, unless mentioned in the notice. *Mann v. King.* 297

5. Demurrer and answer after a peremptory Order for three weeks' farther time to answer, following an Order for a month to plead, answer or demur, not demurring alone, ordered to be taken off the file. *Mann v. King.* 297

6. Service upon the attorney, the Defendant being abroad, only to compel appearance, not for the purpose of a special injunction in the first instance. *Anderson v. Darcy.* 447

7 Order on Plaintiff's motion, that Defendant shall be at liberty to put in his answer without oath or signature, of course, if Defendant is in this country; if abroad, his consent required. *Codner v. Hersey.* 468

8. Issue, whether an instrument was obtained by fraud, &c. not directed on motion after answer, as where the Decree depends upon a simple fact, viz. legitimacy or competence, according to the present practice to refer a title on motion. *Fulagar v. Clark.* 481

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9. Attachment on service of subpoena in Scotland. * *Shaw v. Lindsay.* 496
10. Order to examine a party, saving just exceptions, of course on the suggestion of no interest, refused, where an interest appeared. *Anonymous.* 517
11. Service of subpoena to hear judgment necessary though the cause was set down under the Order upon a peremptory undertaking to speed the cause. *Dixon v. Shum.* 520
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Purchaser under a particular, giving a false description, not bound at Law or in Equity, nor by any act of his agent without a fresh authority or subsequent approbation: a different agreement requiring a fresh authority. 509

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1. Creditor having among other securities a bond with a surety, taking a mortgage from the principal debtor, and agreeing to receive the residue by instalments, secured by warrants, &c. without prejudice to any security he now holds, injunction granted against suing the surety. *Boulton v. Stubbis.* 20
2. Composition, with reserve of the remedy against sureties valid; but must plainly appear. 22

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1. Receiver not ordered merely on a dissolution of partnership. Ordered on breach of the duty of a partner, or of the contract, as by continuing trade with joint effects on the separate account. *Harding v. Glover.* 281
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1. Decree on default setting aside a lease of a charity estate, with covenant for perpetual renewal, and directing an account of the annual rent. Re-hearing permitted on paying Costs, not disturbing proceedings before the Master to the draft of a Report of what was due; but the money not to be paid into Court before the Report made. Peti-

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tion not Motion, the proper application. *Attorney-General v. Brooke.* 319

2. Re-hearing of course on the certificate of Counsel. 325

3. After the Order permitting the Defendant to re-hear the Decree made on his default, setting aside the charity lease, and directing an account of the rents, he was ordered to give security for the sum reported due. *Ibid.* 496

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1. Under a limitation in a marriage settlement of the wife's property, in default of her appointment, for her next of kin or personal representative, the husband not entitled. *Bailey v. Wright.* 49

2. One lease for lives to the lessee and her heirs, and another to her and her executors: as to the effect in equity of a declaration of trust for A. simply, *quære*: but, if the leases were merely renewals by a guardian, the trust must follow the actual interest of the infant, viz. in one estate to the heir, in the other to the executor. 274

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1. General devise and bequest to two persons, their heirs, executors, administrators, &c. upon trust in the first place to pay, and charged and chargeable

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with all the testator's debts and funeral expenses, and the legacies after given. Those persons, being afterwards appointed executors, taking the absolute property, subject only to a charge, are entitled to the residue undisposed of, (including a legacy to a Charity, void by Stat. 9 Geo. II. c. 36,) for their own benefit, against the claim of the next of kin; the whole property being personal. Upon their right, as executors, *Quære. Dawson v. Clarke.* 247

2. Executor takes all, not meant to be disposed of; not all that is not disposed of, as in the case of lapse; or being appointed executor in trust, and no object expressed. 254

3. Personal property bequeathed upon trust, which does not exhaust the whole, the executor not entitled to the surplus. 255

4. Devise and bequest upon trust: the devisee cannot take beneficially the real estate not exhausted; but a trust results for the heir: nor can the executor, whether himself the trustee or another, take beneficially the surplus of the personal property. 255

5. In the ordinary case of lapse the executor will not take; though the subject is not given to any one else. 52

RESIGNATION BOND.

1. As to the validity of a bond of resignation of a living in favor of a particular person and not to accept a Bishoprick (the latter not directed by the Will); and whether to be considered upon the principle of marriage brokerage bonds, as against policy, or as a corrupt transaction, with reference to which the Court would not act, *Quære. Dashwood v. Peyton.* 27

2. General bond of resignation of a living bad. 37

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RESULTING TRUST.

1. Bequest of accumulated fund from real and personal estate, when the legatee attains twenty-one, upon his death under that age a resulting trust for the respective representatives. *Chambers v. Brailsford.* 368

2. Devise, when the devisee attains twenty-one, a resulting trust for the heir until that period; and by the previous death of the devisee the remainder accelerated. *Chambers v. Brailsford.* 368

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2. The presumption of intention to satisfy a legacy by a portion to a child, from a parent, or a person placing himself *in loco parentis*, not raised upon a legacy, not described as a portion, the legatee, reported to be the testator's natural daughter, described, not so, but as the daughter of another man. *Ex parte Pye and Dubost.* 140
3. The law does not acknowledge the relation of a natural child; who is therefore considered as a stranger, within the rule of satisfaction of a legacy *prima facie* by an advance of money. 147
4. Portion by settlement, vested at

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- 21, or marriage of daughters, to be paid at the death of the surviving parent; if the parents, or either should, in their; or either of their life-time settle, give, or advance money, lands, &c. in marriage or otherwise, such advancement to be taken as part or the whole of the portion, unless the contrary declared in writing. A legacy payable at 21 a satisfaction *pro tanto.* *Onslow v. Michell.* 490

5. Rule as to satisfaction of a portion by a legacy, that there must be some express evidence, or at least a strong presumption, that it was intended, as such. Slight variation in the time of payment between twenty-one and twenty-one or marriage immaterial. 493

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1. Any proceeding may be referred for scandal and impertinence; as a state of facts before the Master and affidavits in bankruptcy. *Erskine v. Garthshore.* 114

2. Jurisdiction to expunge scandal from an affidavit in lunacy or bankruptcy, on reference to the Master. *Ex parte Le Heup.* 221

3. Motion of course to refer a bill or an answer for impertinence or scandal. 223

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Lien for general contribution to individual loss by property thrown overboard for the safety of the ship, under the right of the Master to require security, not extended to an injunction against delivering the cargo, receiving the freight, and parting with any share of the ship. The

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1. Direction for sale or transfer of stock without attention to the rise or fall: the party must take it, as it happens at the time of appropriation. *Ex parte Pye and Dubost.* 140

2. Indefinite bequest of the dividends gives the absolute property of stock. *Page v. Lepingwell.* 463

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1. Jurisdiction in the case of a theatre considered as a partnership. *Morris v. Colman.* 437

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2. Contract with the proprietors of a theatre not to write dramatic pieces for any other, legal; as a similar restraint of a performer would be; not resembling a covenant restraining trade generally. *Morris v. Colman.* 437

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1. Annual payment of 1d. by each occupier for tithe of hay, a good *modus.* *Leyson v. Parsons.* 173

2. *Modus* for turnips bad; being of too recent introduction into this Country to be the subject of immemorial usage. *Leyson v. Parsons.* 173.

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TRADE, LICENSED.

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TRADE, OFFENSIVE AND UNWHOLESONE.—See Nuisance.

TRADE (RESTRAINT OF).

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TRESPASS.

1. The jurisdiction against waste by injunction and account applied to trespass, by exceeding a limited right to enter and take stone from a quarry: being a destruction of the inheritance; as in the case of timber, coal, &c.: and the distinction between waste and trespass therefore disregarded. *Thomas v. Oakley.* 184

2. Formerly, before injunction was applied to the case of trespass, upon the death of the party an account was given; the trespass dying with the person. 186

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1. Precatory words held imperative, where the object and subject are certain. 41

2. Bill by heir, suggesting a secret, void, trust for charity in residuary devisees, but without evidence of a trust expressed, or of an engagement, expressed or tacit, preventing it, dismissed with costs; unless the heir would

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take an issue; to which he is entitled. *Paine v. Hall.* 475

3. Devise to a nephew in fee, "not doubting, in case he should have no child, but that he will dispose and give my said real estate to the female descendants of my sister, in such part or parts, and manner, as he shall think fit, in preference to any descendant on his own female line." Trust in the event described for the sister's children. *Parsons v. Baker.* 476

4. Purchases held not a substitution for estates sold under a power in a settlement to sell, and invest the money in estates to be settled to the same uses: there being no original trust, subsequent agreement, or representation relied on. Account decreed of the money produced by the sale, not of the present value. *Denton v. Davies.* 499
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not proved, is no substantial variance: being an admission against himself, and immaterial from a tenant's legal liability.

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1. Order on a purchaser, before conveyance, to pay into Court instalments due, and interest according to the contract, the subject being a coal-mine; and the purchaser in possession and working it. *Buck v. Lodge.* 450
2. Implied covenant by vendor of a freehold estate for the title, though an assignee under a Commission of Banruptcy, selling by a general description, not restrained to his actual interest. 512
3. Whether the effect of advertising for sale a lease in possession is precisely the same as a declaration, that the vendor cannot produce the lessor's title, *Quære.* 512
4. Approbation of Counsel not a waiver of all reasonable objections to the title. 514

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1. Voluntary settlement void under the Stat. 27 Eliz. c. 4, against a subsequent purchaser for valuable consideration with notice, though a fair provision for a wife and children, an Injunction, restraining the husband from selling, was refused; but a demurrer by the husband over-ruled, as covering too much; the Plaintiff being entitled until a sale to an execution of the trust. *Pulvertoft v. Pulvertoft.* 84

2. Limitation to brothers or other relations within the consideration of a settlement, and therefore not voluntary. 90

3. Purchase-money cannot be laid hold of in favor of claims under a previous settlement void under

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4. Articles executed against a voluntary settlement. 92
5. Voluntary settlement good between the parties. 92
6. Court of Equity will not act in favor of a mere voluntary settlement; and therefore upon a subsequent purchase with notice and covenant to lay out the money to the same uses, will not lay hold of the money. 93
7. Distinction upon the want of consideration. Upon a contract merely voluntary this Court will do nothing; but takes jurisdiction upon a trust actually created, unless perhaps against a party, having a right to put an end to it by his own act under a sole power of revocation; by analogy to the distinction between the cases, where an entail can be barred by fine, and where a recovery is necessary. 99
8. The distinction between contract and trust with reference to the want of consideration has been acted upon under the same instrument. 99
9. Voluntary settlement, though free from actual fraud, and meritorious, as a provision for relations, void against a subsequent purchaser for valuable consideration, with notice, whether by conveyance, or articles, specific performance decreed in the latter case. *Buckle v. Mitchell.* 100
10. Notice of the contents of a voluntary settlement has no effect even in equity: therefore notice of a covenant in a voluntary settlement, that the purchase-money should be paid to trustees, to be laid out in other lands, to be settled to the same uses, held immaterial. 112
11. No equity under a voluntary settlement to prevent a sale. 112

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12. Distinction between a voluntary contract and a trust created without consideration: in the latter case the Court acts; not in the former. 149

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1. "I A. B. do make this my Will" equivalent to signature, and, if acknowledged before three witnesses, a good execution within the statute of Frauds. 183
2. Effect of the word "estate" in a Will; as importing the absolute property. 195
3. Testator gave legacies, with maintenance, to his two illegitimate children, naming them, by C. B: and to all the other children he might have by her 6000*l.* each, and after other bequests the residue among his said children. By Codicil he directed maintenance of another child born since; also interlining his name with those of the other children in the first part of the Will only. That child entitled only to maintenance and a share of the residue, not to the legacy of 6000*l.* *Arnold v. Preston.* 288
4. Residuary bequest cancelled by striking through with a pencil all the disposing part, leaving only the general description, with notes in pencil in the margin indicating alteration, and a different disposition of certain

WILL—continued.

- articles; a resulting trust for the next of kin. *Mence v. Mence*. 348
5. Term for 99 years in a Will restrained to a life by implication from a subsequent limitation, not after the end of the term, but after the failure of that life. 421
6. Of two inconsistent limitations in a Will the latter prevails. 421
7. Will not to be construed by something *dehors*, as by the state of the property, where no latent ambiguity. 466

WILL—continued.

8. Different construction of the word "surplus" from that which it commonly bears, inferred from the expression of the Will. 466
- See Conversion of Estate. Devise. Resulting Trust.

WITNESS.—See Evidence.

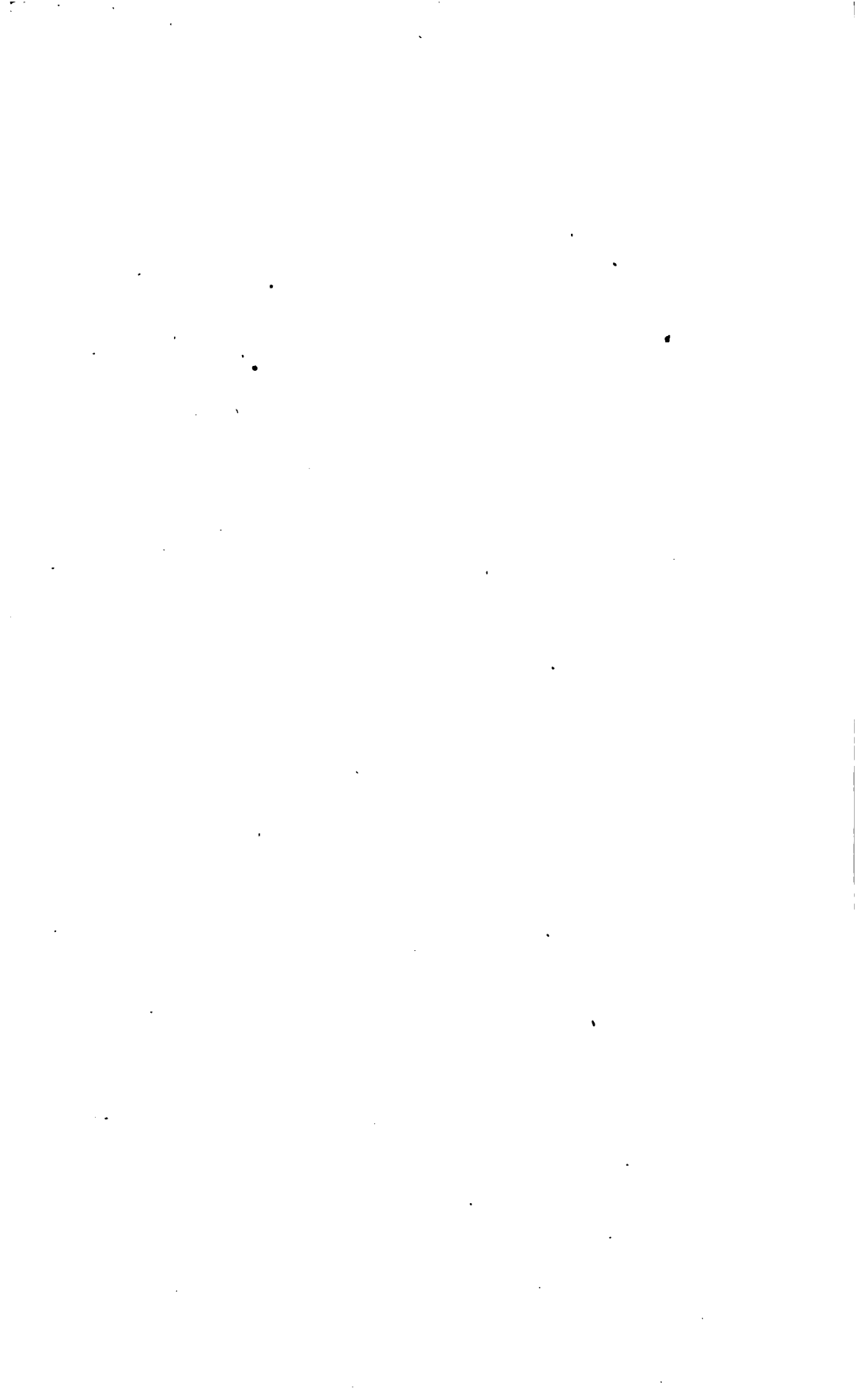
WORDS, PRECATORY.

See Trust, 1. Writ of Ne exeat Regno.

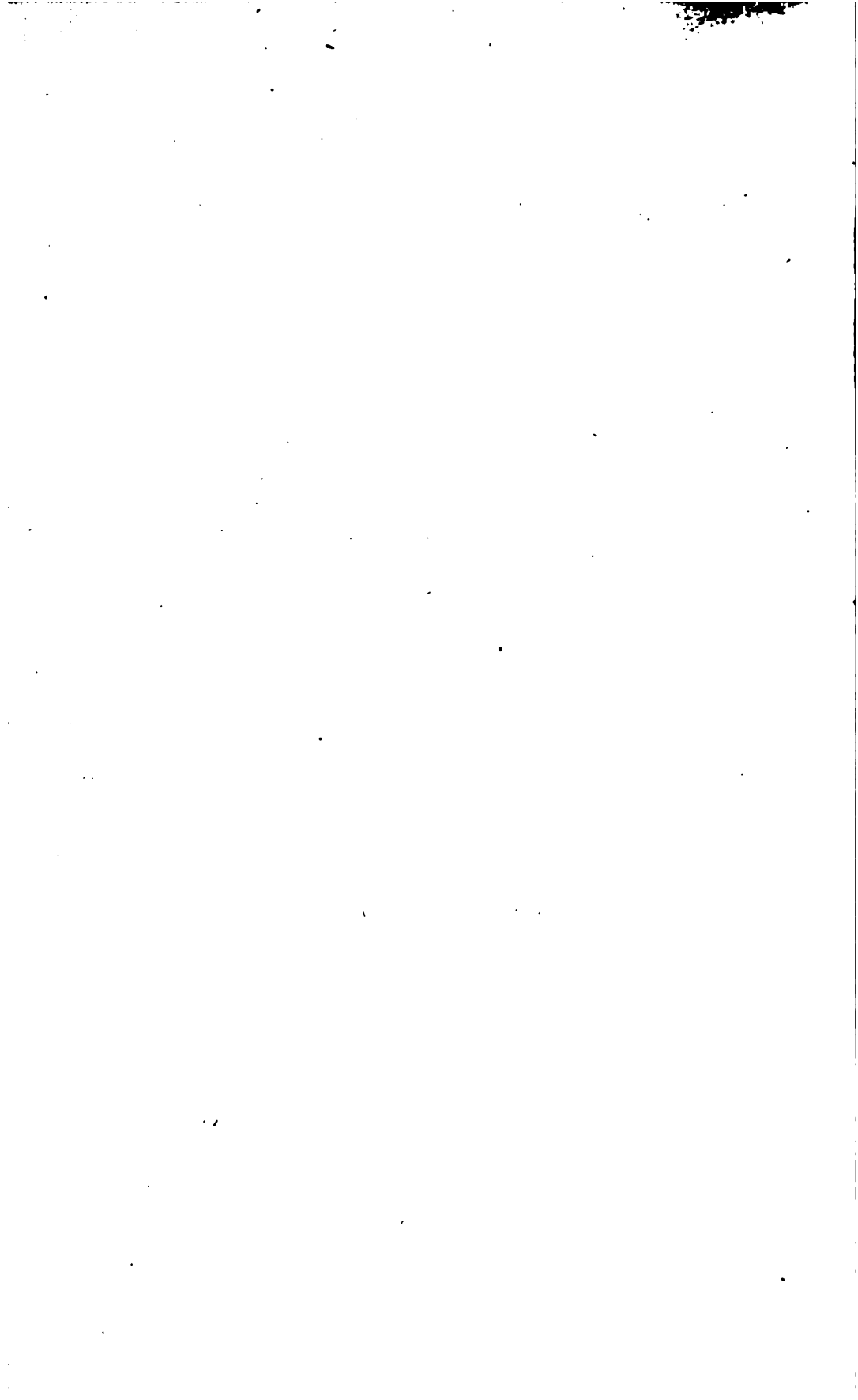
WRITTEN CONTRACT.

See Frauds (Statute of).

END OF THE EIGHTEENTH VOLUME.















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